SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. 533

EDYTHE RICE DYER, *Petitioner*

v.

EDWARD P. MURRAY, as successor trustee under the Will of the late JOHN CASSIDY, JANE MURPHY SULLIVAN, JOHN CASSIDY, BARBARA ANN CASSIDY, ROSELLA MARIE CASSIDY FLYNN, and JOAN CASSIDY STETSON, *Respondents.*

Petition for a writ of certiorari to the Supreme Judicial Court of Maine, sitting as the Law Court.

Edythe Rice Dyer
Petitioner pro se
61 State Street
Bangor, Maine

CONTENTS

		Page
1.	Opinions Below	2
2.	Jurisdiction	2
3.	Constitutional Questions Presented	3-4
4.	Constitutional Provisions	
	a) *Amendment XIV*	4
5.	State Statutes	
	a) Revised Statutes of Maine, 1954, Chap. 170, Sec I, Subsec. II	4
6.	Statement of the Case	4-9
7.	Argument	9-16
8.	Conclusion	16-18

(CONTENTS OF APPENDIX)

1.	Order of the Maine Superior Court of October 4, 1961	A-1
2.	Opinion of the Supreme Judicial Court of Maine of March 23, 1962	A2-12
3.	Denial by Supreme Judicial Court of Maine of Edythe Rice Dyer's Petition for Review of the Law Court Decision of March 23, 1962	A-13
4.	Final Decree of the Maine Superior Court	A14-16

TABLE OF CASES AND STATUTES

1.	*Berman v Shalit*, 152 Me. 266, 128A. 2nd 345	A-4
2.	*Cassidy, Guardian, v Murray, Trustee*, 144 Me. 326, 68A 2nd 390	7, 10, A-4, A-5
3.	*Doherty v Grady*, 105 Me. 36, 72A 869	12
4.	*Fairbanks Appeal*, 104 Me. 333, 71A 933	12

		Page
5.	*Fisk v Keene*, 35 Me. 349	8, 10
6.	*Hopkins v Keazer*, 89 Me. 347	12
7.	*In re Bonsall's Estate*, 288 Pa. 39, 135A 724	A-8
8.	*Lermond v Hyler*, 121 Me. 54, 115A 546	11, 12, A-7, A-10
9.	*Mellen v Mellan*, 148 Me. 153, 90A 2nd 818	A-6
10.	*Merrill Trust Co. v Perkins, et al*, 142 Me. 363, 53A 2nd 260	11, 12, A-8
11.	*Morton v Barrett*, 22 Me. 257	8, 10
12.	*Murray v Sullivan et al*, 179A 2nd 307	2, A-2
13.	*New England Trust Co. et al. v Sanger et al.* 151 Me. 295, 118A 2nd 760	A-4
14.	*Proctor v Clark*, 154 Mass. 45, 27 NE. 673, 12LRA. 721	A-7
15.	*Stamford Trust Co. v Lockwood*, 98 Conn. 337, 119A 218	14
16.	*Tucker v Nugent*, 117 Me. 10	12
17.	*Welch v Howard*, 227 Mass. 242, 116 NE 492	A-7
18.	*White v Underwood*, 215 Mass. 299, 102 NE 426	A-7
19.	*Whorff v Johnson*, 143 Me. 198	11
20.	28 USC 1257 (3)	3
21.	Revised Statutes of Maine, 1954, Chap. 170, Sec. I, Subsec. II	4, 7, 9, 10, 11, 12, 15, 16, A-3
22.	Amendment IV of the Constitution of the United States	3, 4, 8, 10

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v.

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Petition for a writ of certiorari to the Supreme Judicial Court of Maine, sitting as the Law Court.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Judicial Court of Maine, sitting as the Law Court, entered on March 23, 1962, in the case of EDWARD P. MURRAY v. JANE MURPHY SULLIVAN, EDYTHE RICE DYER, JOHN CASSIDY, BARBARA ANN CASSIDY, ROSELLA MARIE CASSIDY FLYNN *and* JOAN CASSIDY STETSON.

OPINIONS BELOW.

On October 14, 1961, the Justice of the Superior Court of Penobscot County, State of Maine entered an order reporting the case to the Supreme Judicial Court of Maine, sitting as the Law Court. This order is unreported. The opinion of the Supreme Judicial Court of Maine sitting as the Law Court was rendered on March 23, 1962, and filed on March 26, 1962. It has not been officially reported, but is unofficially reported at 179 A. 2nd 307. On June 5, 1962, the Supreme Judicial Court of Maine, sitting as a Law Court, denied a petition by the Petitioner for Review of the Law Court decision. This order was filed on June 19, 1962, and has not been reported.

Under the name of *Edward P. Murray, Trustee* v. *Jane Murphy Sullivan et als*, the Superior Court of The State of Maine on July 9, 1962, rendered its decision in accordance with the mandate and order of the Supreme Judicial Court of Maine, sitting as the Law Court. This decision is unreported but that portion of the Superior Court decision involved herein appears at (A-13-15).

On September 17, 1962, Mr. Justice Brennan of the Supreme Court of the United States granted an order extending until October 17, 1962, the time in which the Petitioner would be allowed to file her petition asking that a Writ of Certiorari be issued to the Supreme Judicial Court of Maine.

JURISDICTION.

The order and judgment of the Law Court was made on March 23, 1962, and filed with the office of the Clerk of the Law Court on March 26, 1962. On July 9, 1962, the Superior Court of the State of Maine handed down its judgment in accordance with the mandate and order of the Law Court. On June 19, 1962, the Law Court

entered an order denying a petition on behalf of Edythe Rice Dyer, for review of the Law Court order and judgment of March 23, 1962. On September 17, 1962, Mr. Justice Brennan of the Supreme Court of the United States granted an order extending the time in which the Petitioner could file her petition for certiorari until October 17, 1962. The jurisdiction of this Court is invoked under 28 USC 1257 (3) conferring jurisdiction on this Court over final judgments or decrees rendered by the highest court of the State of Maine, in a proceeding where titles, rights, privileges, or immunities were set up or claimed under the Constitution of the United States.

QUESTIONS PRESENTED.

1. If the testator intended that upon the termination of the trust his estate was to be distributed per stirpes in three equal portions, did the Law Court in interpreting the testator's intent as being a per capita distribution act in so arbitrary and capricious a manner as to deprive the remaindermen under the will of vested property rights without due process of law and of the equal protection of the law in violation of the fourteenth Amendment to the Constitution?

2. Did the Supreme Judicial Court of Maine, sitting as the Law Court, by artificially advancing the date of the testator's death from March 25, 1918, to June 9, 1961, and by interpreting the residuary clause of the will in a manner inconsistent with its prior determination of the testator's intent as expressed in the trust created under the will, act in such an arbitrary and capricious manner as to deprive the remaindermen under the will of due process of law and of the equal protection of the laws in violation of the fourteenth Amendment of the Constitution?

3. By refusing to apply the first sentence of Chapter 170, Sec. 1, Subsec. II of the Revised Statutes of Maine 1954, and by applying the second sentence of the said Chapter 170 when in fact the testator died leaving children, did the Supreme Judicial Court of Maine, sitting as the Law Court, deprive the remaindermen of due process of law and of the equal protection of the laws in violation of the fourteenth Amendment of the Constitution?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

Amendment XIV

". . . nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Revised Statutes of Maine, 1954, Chap. 170, Sec. 1, Subsec. II.

"II. The remainder of which he dies seized, and if no widow or widower, the whole shall descend in equal shares to his children, and to the lawful issue of a deceased child by right of representation. If no child is living at the time of his death, to all his lineal descendants; equally, if all are of the same degree of kindred; if not, according to the right of representation."

STATEMENT OF THE CASE.

John Cassidy, a highly successful Bangor businessman, made his Will on February 21, 1906. Copies of that Will, of a first Codicil dated May 4, 1910, and of a Second Codicil dated November 3, 1911, were annexed as exhibits to the Bill of Complaint. (R. 8-30) At the

time Mr. Cassidy made his Will, he was 64 years of age, had been a widower since 1894, and had five children then living. All of his children, though adults of ages 23 to 40, were then unmarried and living in John Cassidy's household.

Mr. Cassidy's 1906 Will placed his entire estate, consisting in substantial part in wild lands and other real estate, in trust with his eldest son, James W., and his youngest daughter, Lucy, as Trustees. His eldest son James, who had been in partnership with him since 1890 (R. 53), was to "give exclusively his whole time and attention" to the management of the Cassidy Estate for which he was to receive as compensation $10,000 per year. (R. 14-15, 20-21) No other compensation as Trustees or Executors was to be paid to either James or Lucy, the Testator declaring that he deemed such limitation "to be fairer for the interests of my other children" (R. 21). The Will provided further that during the continuance of the Trust, the Trustees should "provide for the comfortable support and maintenance" of each of his five named children "during the life of each of them, and at the decease of each of them, then to all the lineal descendants together, if any, of each of them," a sum not exceeding $4,000 per year (R. 16), raised to $10,000 per year by the First Codicil. (R. 24) Also each of such named children was given a right to occupy rent-free in the City of Bangor, either "one of my houses" or a house which such child could request the Trustees to acquire in the Trustees' names at a sum not exceeding $5,000; the same single house was available "after the death of each of my said children, for the lineal descendants, if any, of each one of my said children." (R. 17-18) The Trust was to continue until the decease of all five of the Testator's children (R. 8) and thereupon the estate was to be distributed as follows:

> "Upon the termination of this Trust, as aforesaid, namely, after the decease of all of my said five named children, all my estate in whatever form the estate shall then be, shall then vest in and become the property of all of my lineal descendants, if any, then living, in the same manner and in the same proportions as shall then be provided by the then existing laws of the State of Maine for the descent among lineal descendants of intestate property, real and personal." (R. 18)

The above-quoted sentence, which controls the decision of this case, is the first sentence of what may for convenience be termed the "Trust Termination Paragraph." That paragraph was amended and re-published by the First Codicil of May 4, 1910, without, however, making any change in its first sentence as quoted above. The Second Codicil provided a $1,000 annuity for the Testator's sister, Ellen Herlihy, and republished the Will without other change. (R. 29)

The Testator was incapacitated by a stroke for the period from December 1, 1912, to his death in 1918. (R. 58-59) At his death only four of his children were living, his daughter Rosella having previously died leaving one child, Edythe (now Edythe Rice Dyer, the Petitioner herein). Prior to his death another of the Testator's daughters, Mary, had married and had one child, Jane (now Jane Murphy Sullivan, one of the Respondents herein). The Testator's son John F. Cassidy, the father of the other four Respondents herein, was not married until October 20, 1920, (2½ years after the death of the Testator). His four children, who are Respondents herein, were born between August, 1924, and December, 1930.

The four surviving children of the Testator are now all dead, the last, Lucy or Lucile C. O'Brien, having died leaving no issue on June 9, 1961.

On June 26, 1961, Edward P. Murray, as successor trustee under the will of the said John Cassidy, filed a complaint in the Superior Court of Penobscot County, State of Maine. By his complaint, the trustee requested that the Court adjudge to whom and in what proportion he should pay over the remainder of the trust corpus. (R. 7). On October 14, 1961, the matter came on for hearing before the Honorable Abraham M. Rudman, Justice of the Superior Court. Upon an agreed statement of facts and by agreement of the parties, Justice Rudman ordered that the case be reported to the Supreme Judicial Court of Maine, sitting as the Law Court, to render the ultimate decision upon the complaint, the answers, the agreed statement of the case and such of the evidence submitted that day as was legally admissible. (R. 77) (A-1).

The applicable state statute incorporated by reference in the will is R.S. 1954 Ch. 170, Sec. 1, Subsec. II. Said statute is the same as was in existence at the time the will was executed and the date of the Testator's death; said statute provides in part:

> "II. The remainder of which he dies seized, and if no widow or widower, the whole shall descent in equal shares to his children, and the lawful issue of a deceased child by right of representation. If no child is living at the time of his death, to all his lineal descendants; equally, if all are of the same degree of kindred; if not, according to the right of representation."

Prior to this case, the same court in the case of *Cassidy, Guardian* v. *Murray, Trustee*, 144 Maine 326, 328, 68 A 2nd 390, 391 held that "It is the intention of the testator which must prevail in the construction of a will. But that intention must be found from the language of the will read as a whole illumined in cases of doubt by the light of the circumstances surrounding

its making." The court after making this statement went on to hold that the testator had intended and unequivocally provided for a stirpital distribution of the support payments under the trust created by the will. Under the clause setting forth the support payments under the trust the testator defined what he meant by the term lineal descendants to mean the lineal descendants of each of his children as specific groups or classes. (R. 17). Faced with this definition, its prior decisions as to the testator's intention, as shown by the trust clauses, and the decision in *Fisk* v. *Keene*, 35 Maine 349 and *Morton* v. *Barrett*, 22 Maine 257, (where the court held that in laying hold of the testator's true meaning, words occurring more than once in a will shall be presumed to be always used in the same sense, unless the context shows a contrary intention), and the fact that at the time of his death he was survived by four children and two grandchildren, the Law Court arbitrarily advanced the date of the testator's death some forty years and held that the testator intended a per capita rather than a per stirpes distribution of the trust corpus. (A-10).

The first time the case was heard on its merits was before the Supreme Judicial Court of Maine, sitting as the Law Court. This Court is the highest Court in the State of Maine and its decisions cannot be appealed to a higher court within the State. Prior to its decision, the Petitioner could not reasonably have anticipated that the Court would disregard the actual facts of the case and its prior decisions in such a manner as to deprive the Petitioner of her rights under the fourteenth Amendment of the Constitution. While the Constitutional issues were not specifically raised before the Law Court they were of necessity implied from the merits of the case and the proceedings. As the Law Court denied, on July 19, 1962, the Petitioner's petition for review of the Law Court decision, this is the first opportunity she has

had to reasonably specifically raise these issues hereinbefore set forth.

ARGUMENT.

The decision of the Supreme Judicial Court of Maine, sitting as the Law Court, has overturned the law of Maine existing from the date of Maine's entrance into the Union. In so doing the Law Court has cast doubts upon the right of an individual to dispose of his property in a manner consistent with his true intentions and desires. The Law Court has said in effect that it makes no difference what an individual may desire to do in disposing of his estate, the Law Court will make the decision for him even though in so doing the individual's intent may be prostituted and the objects of his bounty deprived of their rights under the Laws of the State and the Constitution of the United States.

Under the terms of his Will, John Cassidy set up a trust to provide for the comfortable support and maintenance of each of his five named children "during the life of each of them, and at the decease of each of them, then to all the lineal descendants together, if any, of each of them." (R. 24). This trust was to continue until the decease of all five children (R. 8) and thereupon the estate was to be distributed to his lineal descendants in the same manner and proportions as provided by the laws of the State of Maine for the descent among lineal descendants of intestate property, real and personal. (R. 18).

The applicable State statute governing the descent of intestate property among lineal descendants is R.S. 1954, Ch. 170, Sec. 1, Subsec. II, and states that where a man dies without widow but survived by children the whole shall descend in equal shares to his children, and the lawful issue of a deceased child by right of representation, and only in the event that there are

no children living at the time of his death shall his property go to all of his lineal descendants on a per capita basis.

There is no question but at the time of his death John Cassidy was survived by four of his children and two granddaughters. (R. 55). Thus the first section of the said Ch. 170, Sec. 1, Subsec. II, is satisfied and should have been applied by the Law Court in making its determination as to whom and in what proportion the trustee should distribute the trust corpus. However, the Law Court refused to so do and ruled that "it would be incongruous to permit the statute to operate as though at least one child were still living." (A-10). Thus while the Testator expressed his intent that his estate be distributed in accordance with the terms of the said statute, and the statute states that where children are living at the time of a man's death his estate is to be distributed per stirpes, the Law Court refused to follow the Testator's and the statute's directive, thereby denying your Petitioner her right of equal protection under the laws and deprived her of her property rights without due process of law as guaranteed by the fourteenth Amendment.

Since the cases of *Fisk* v. *Keene*, 35 Maine 349 and *Morton* v. *Barrett*, 22 Maine 257, it has been the law in Maine that in construing a testator's intent, words occurring more than once in a will shall be presumed to always be used in the same sense, unless the context shows a contrary intention. The Law Court applied this rule of construction in the case of *Cassidy, Guardian* v. *Murray, Trustee*, 144 Maine 326, 328, 68 A 2nd 390, 391. In that case it was held that under the trust created by the Will, the Testator had intended and unequivocally provided for a stirpital distribution of the support payments as he had defined lineal descendants to mean the lineal descendants of each of his children as specific groups. Yet in rendering its decision in the pres-

ent case, the Law Court seems to have not only ignored its own mandates and prior decisions (cited above) but also its decision in *Whorff* v. *Johnson*, 143 Maine 198, 204 where it held that "lineal descendants" means the same thing as "issue." In arriving at its decision the Law Court held that as far as the distribution of the trust corpus was concerned, the Testator intended a per capita distribution rather than stirpial when he used the term "lineal descendants" in reference to the remaindermen. (A-5). Thus the Law Court ruled "lineal descendants" was used by the Testator to designate the family groups comprising the class of beneficiaries under the trust provisions, and used to designate the class of beneficiaries irrespective of family groups under the residuary clause of the Will.

It should be noted in reference to the residuary clause the Testator used the phrase "all of my lineal descendants." (R. 18). The clear meaning of this phrase becomes apparent when read in connection with the contingent bequest to his sister Ellen Herlihy. Under that gift he referred simply to "her lineal descendants" (R. 27) and not "all of her lineal descendants." He did not need to use the word "all" in reference to her lineal descendants as they formed only one group while his own lineal descendants were, in his thinking, divided into family groups headed by each of his children.

In reaching its decision that John Cassidy intended a per capita distribution of the trust corpus, the Law Court relied heavily on the cases of *Lermond* v. *Hyler*, 121 Maine 54, 115A 546 and *Merrill Trust Company* v. *Perkins et al*, 142 Maine 363, 53 A 2nd 260. In those cases the Court held that where the testator provided after the death of the life tenant his property was to pass "to my then heirs," as provided by law (*Lermond* v. *Hyler supra*) and to "those persons to whom it would pass by descent under the Statutes of Maine regulating the descent and distribution of intestate estates" (*Mer-*

rill Trust Company v. *Perkins et al supra*) that the statute should be applied as of the date of death of the life tenant and as though the testator's death had occurred at that time. Yet the holding in those prior cases should not be controlling if the testator had a different intent. The Law Court recognized this when it said "It is the intention of the testator which must prevail in the construction of a will. But that intention must be found from the language of the will read as a whole illumined in cases of doubt by the light of the circumstances surrounding its making." (A-4).

Yet in arriving at its decision the Law Court failed to do that very thing. At the date the Will was executed and up to the date of the Testator's death, the law of Maine had always been and still remains that in reference to the laws of descent or the identification of beneficiaries such words as heirs call for a stirpital distribution of estate assets. *Hopkins* v. *Keazer*, 89 Maine 347; *Fairbanks Appeal*, 104 Maine 333, 71 A 933; *Tucker* v. *Nugent*, 117 Maine 10; *Doherty* v. *Grady*, 105 Maine 36, 72 A 869. These were the decisions the Law Court should have relied on in making its determination of John Cassidy's intent rather than the decisions of *Lermond* v. *Hyler* and *Merrill Trust Company* v. *Perkins et al* (*supra*) as it was those cases decided before the Lermond and Merrill Trust Company cases that the Testator was aware of and not the latter two as they were decided long after his death and could have had no bearing on his intention when the Will was executed.

By its decision the Law Court has placed a premium on the Testator's children being prolific. By ruling that the Testator intended a per capita distribution, the Court has in effect said that John Cassidy favored his children in proportion to the number of offspring they produced. That such was not the case can readily be ascertained from an examination of the family situation during the Testator's lifetime.

The five Cassidy children were far from being a "close" family or one free from serious strife. On the contrary, the children were jealous of their expectable rights to benefit from their father's bounty. Each was ready to fight for equal treatment for himself and his family or "lineal descendants." These facts are shown by events occurring during the Testator's lifetime and immediately following his death. The Record adequately sets forth the facts, without need for comment here, of the legal controversy among the children in 1915 (R. 58), of the hotly litigated will contest in which two of the Testator's children charged a third with "fraud, deceit, and undue influence" (R. 60-61), and of the litigation of charges of embezzling their father's property made by two children against a third (R. 67-74).

The Testator inevitably was fully aware of this underlying family strife at the time he made his Will and Codicils, that is, in the period from February, 1906, through November, 1911. In such circumstances he would anxiously avoid any testamentary provision that by unequal treatment of their respective families would increase the strife among his children during their lifetimes after his death.

Another fact indicates the five Cassidy children's expectation (during the Testator's lifetime) that they, and their respective families after their decease, would be treated on par. Following a controversy within the family, the five children of the Testator agreed formally in writing on March 1, 1915, that each "could draw up to $250 per month, which would be charged on the books of John Cassidy, with interest at 5%." (R. 58). Less than 3 months later Rosella Cassidy Rice died. (R. 55). It is significant that moneys were thereafter paid to Edythe Rice, the only child of the deceased Rosella. These payments to young Edythe averaged approximately $250 per month (the same sum agreed upon for

each child in the March 1, 1915 Agreement) from October, 1915, to March, 1918, when the Testator died. (R. 58-59). The formal written Agreement had no express provision for these payments to the descendants of a deceased child of John Cassidy. However, the Cassidy family in practical fact followed what might be called an "inter vivos per stirpes arrangement." Edythe received what her late mother and each of the Testator's other children could draw under the March 1, 1915, Agreement. Although Jane Murphy Sullivan was then living, she received nothing because her mother, Mary A. Murphy, was living. (R. 59). Despite the fact that Mary Murphy had both herself and her young daughter Jane to support, she received nothing more than that received by the young Edythe Rice alone. Cf. *Stamford Trust Co.* v. *Lockwood*, 98 Conn. 337, 119 Atl. 218, 221 (1922). This shows how deeply ingrained in the Cassidy family thinking was the principle that the 5 stirpes or families should be treated equally.

The Testator was so anxious to have complete parity among his children that he specified the per stirpes distribution irrespective of circumstances which in the abstract one might contend justified a per capita distribution. For example, even though the Trust was almost certain to last for a long time and even though the number of lineal descendants of one or more of the Testator's children might become very numerous, Mr. Cassidy limited each group of his lineal descendants to a single $10,000 per year for support and to a single "one of my houses" in Bangor (or $5,000 to buy one).

An examination of the family situation of the Testator provides further evidence of a general intention by the Testator to treat his lineal descendants in family groups. At the time of the making of the Will, nearly 56 years ago, the Testator's five children were all adults, all unmarried and all living in his household. He knew them, and only them, as definite individuals. It would

be stretching reality and inconsistent with normal human experience to expect the Testator to think beyond his own children to subsequent generations and to think of the members of later generations as individuals, rather than derivatively as the hypothetical descendants of his children.

In keeping with these circumstances at the time of its making, February 21, 1906, the Will had a thorough per stirpes pattern. The Testator did not change the per stirpes form of distribution, but rather reaffirmed and republished it, in the Codicils of 1910 and 1911, despite intervening family disappointments that were to him great. Also, in view of the strife within the family, with each child seeking treatment of equality with each of his brothers and sisters, it was only natural that the Testator should provide for a per stirpes distribution which assured his five children that they and their families would be treated alike.

From the whole Will and from the circumstances, it clearly would have been abhorrent to the Testator for the family of any one of his children to receive more than the family of another of his children. Any such inequality among the families of the Testator's children is utterly inconsistent with everything that can be gathered about his intention from the Will and the circumstances surrounding it.

To arrive at its determination that the second sentence of Ch. 170, Sec. 1, Subsec. II applied, the Law Court had to unnaturally advance the date of the Testator's death some forty-three years from 1918 to 1961. In so doing the Law Court had to make the decision that the Testator did not want to die on the date that he did but wanted to wait until 1961 when all of his children had died. It also had to make the further assumption that John Cassidy did not want to die leaving any children surviving him. Yet prior to the date of his death, there was no indication in any decision by the Law

Court that a man could artificially advance the date of his death to a date long after that when he actually passed away. (i.e. neither the Lermond nor Merrill Trust Company cases were decided until after his death.) Thus the only way it is possible to determine the Testator's true intent as to which sentence of Ch. 170, Sec. 1, Subsec. II he desired to incorporate into his Will is to read the section in question illuminated by light of the facts actually existing at the time of execution and at the date of John Cassidy's death, and the law then in effect as determined by the cases. In so doing we find that at those times, John Cassidy had children and reasonably expected them to survive him (which in fact they did). Thus there being no judicial decisions indicating the Law Court would advance the date of a man's death, the only reasonable way to read the statute is to give the words and conditions expressed therein their usual and normal meaning, i.e. a man's property shall descend by right of representation in equal shares to his children and their lawful issue when he dies survived by children. This interpretation of the statute is in strict conformity with the long existing law of the State of Maine and of the United States. For it is axiomatic that where a Will can be read in strict conformity with its terms, the Courts have no authority to resort to artificial means (such as advancing his date of death some 43 years) to effectuate an assumed intent of the Testator. By so doing the Court is not construing the Will of the Testator but is actually writing a new Will for him.

CONCLUSION.

The Court in reaching its decision, that the Testator wanted to have his estate distributed as though he died after the death of his last child and thereby intended a per capita distribution of his estate under the said Ch. 170, Sec. 1, Subsec. II, had to reason in circles.

The Court, after saying that the Testator did not intend for the statute to operate as though at least one child were living, (A-10) went on to say that "To effectuate the Testator's intention as disclosed by this testamentary pattern, the statute must be applied as though the Testator's death occurred immediately after the death of his last surviving child so that the condition that 'no child living' is satisfied." (A-10).

In effect the Court said we assume that the Testator wanted the "no child living" clause of the statute to control, and the Court therefore assumed that he intended to have the actual date of his death advanced by 43 years.

It is unreasonable for the Maine Law Court to apply the intestate descent statute according to the Court's assumption; that Mr. Cassidy intended the distribution to be made, as though he had died after the decease of his last surviving child, AND ("as though" no child was living when he actually did die).

In FACT children were living at the time of his death and the meaning of the statute is based upon (children living or not living at the time of his death.)

Obviously, the intent of the Testator cannot be established by basing an assumption upon an assumption.

Your Petitioner contends that the Law Court ignored its prior decisions governing the construction of wills of this type and that its decision is based upon circular reasoning; that in construing the Will the statute should be applied in such manner as to recognize the admitted fact that the testator was survived by children.

In so doing the Law Court has deprived the Petitioner of her vested property rights without due process of law and has denied her of equal protection of the law, all in

violation of the 14th Amendment to the Constitution of the United States of America.

Respectfully submitted,

EDYTHE RICE DYER
Petitioner pro se
61 State Street
Bangor, Maine
October 15, 1962

APPENDIX.

ORDER.

This Court being of the opinion that this action involves a question of law of sufficient importance and doubt as to justify reporting this action to the Law Court, and the parties having appeared and agreed to such report as shown by their foregoing stipulations,

IT IS ORDERED that this action be reported to the Law Court, which Court shall, upon the Complaint, Answers and Agreed Statement of Facts, and such of the evidence as is legally admissible, render such decision as the rights of the parties require.
Dated October 4, 1961.

/s/ ABRAHAM M. RUDMAN

.....
Justice, Superior Court

OPINION OF THE SUPREME JUDICIAL COURT OF MAINE.

EDWARD P. MURRAY

v.

JANE MURPHY SULLIVAN *et al.*

Decided March 23, 1962

Before WEBBER, TAPLEY, SULLIVAN, DUBORD and SIDDALL, JJ.

WEBBER, Justice.

On report. By his will executed on February 21, 1906, the late John Cassidy first created a trust for the benefit of his five children and their lineal descendants which should endure until the death of the last surviving child. He then disposed of the remainder of his estate in these terms:

"Upon the termination of this trust, as aforesaid, namely, after the decease of all of my said five named children, all my estate in whatever form the estate shall then be, shall then vest in and become the property of all of my lineal descendants, if any, then living, in the same manner and in the same proportions as shall then be provided by the then existing laws of the State of Maine for the descent among lineal descendants of intestate property, real and personal."

The testator died on March 25, 1918, leaving no widow and survived by four of his children, James, Mary, John F. and Lucy, and a grandchild, Edythe Rice Dyer. The latter is the only child of the testator's daughter Rosella who had predeceased her father on May 25, 1915. The trust terminated upon the death of

Lucy on June 9, 1961. The lineal descendants of the testator in the nearest degree then comprised the six grandchildren who are claimants here, the said Edythe Rice Dyer, Jane Murphy Sullivan, only child of Mary, and Roselle M. Flynn, Joan Stetson, Barbara Anne Cassidy and John Cassidy III, the last four being the children of John F. Cassidy.

The applicable statute, incorporated by reference into the will, is R.S. 1954, Ch. 170, Sec. 1, Subsec. II which provides:

"II. The remainder of which he dies seized, and if no widow or widower, the whole shall descend in equal shares to his children, and to the lawful issue of a deceased child by right of representation. If no child is living at the time of his death, to all his lineal descendants; equally, if all are of the same degree of kindred; if not, according to the right of representation."

The parties agree that the six grandchildren are the persons to whom the trustee must distribute the corpus of the estate in the discharge of the responsibilities imposed upon him by the will. They agree that the plaintiff trustee requires the guidance of the court in making final distribution. They disagree only as to the size of the share each claimant should receive. Mrs. Sullivan and Mrs. Dyer, hereinafter called for convenience the proponents, contend that since the testator had children living at his death, the first sentence of the quoted portion of the statute is controlling and that the grandchildren should take as the "lawful issue of a deceased child by right of representation." In short, the two proponents would each take one-third while the four opponents would each taken one-twelfth. The opponents assert that the statute should be applied as of the moment immediately following the death of the last surviving child so that by application of the second sentence of the quoted portion of the statute each grandchild would take *per capita* one-sixth of the remainder.

(1) All parties to this controversy agree upon certain fundamental principles of will construction frequently enunciated in prior decisions of this court. "It is the intention of the testator which must prevail in the construction of a will. But that intention must be found from the language of the will read as a whole illumined in cases of doubt by the light of the circumstances surrounding its making." *Cassidy, Guardian* v. *Murray, Trustee*, 144 Me. 326, 328, 68 A. 2d 390, 391. Since we seldom find an exact duplication in the phraseology of those wills which come before the courts for interpretation, we are not often greatly aided by prior judicial decisions involving the construction of other wills. *New England Trust Co., et al.* v. *Sanger, et al.*, 151 Me. 295, 303, 118 A. 2d 760; *Berman* v. *Shalit*, 152 Me. 266, 268, 128 A. 2d 345. In Maine there is no judicial inclination to prefer either a *per capita* or a *per stirpes* distribution. *Mellen* v. *Mellen*, 148 Me. 153, 159, 90 A. 2d 818. There is further agreement that, whatever the respective shares of the ultimate takers, the remainder did not vest in them until after the death of the testator's last surviving child—such having been provided by the language of the will with great care and particularity.

The proponents vigorously contend that the intention of the testator to follow a *stirpital* testamentary pattern is clearly evidenced by the language of the trust clause providing for support payments for his children and their lineal descendants. This clause provides:

"During the continuance of this Trust, the Trustees of my estate shall provide for the comfortable support and maintenance of each and all of my said five children (naming them), during the life of each of them, and at the decease of each of them, then to all the lineal descendants together, if any, of each of them, a sum, not exceeding for each of them, or all the lineal descendants, if any, of each of them, four thousand dollars (later increased by codicil to ten thousand dollars) per year,

beginning at the time of my decease. And upon the decease of each of my said five children, without leaving any lineal descendants living at the time of the death of each of them, then said payment of a sum not exceeding (ten) thousand dollars per year, as aforesaid, for each year, shall immediately cease."

(2, 3) This clause clearly and unequivocally provided for a *stirpital* distribution of support payments and the will was so construed in *Cassidy, Guardian* v. *Murray, Trustee*, 144 Me. 326, 68 A. 2d 390. There were other provisions of the will which preserved absolute equality among the children and as between living children and the lineal descendants of deceased children until the death of the last surviving child. The proponents find it inconceivable that the testator might "shift gears" and suddenly depart from a pattern of rigid equality among family groups to adopt a pattern of equality among individuals. We do not view such a transition as either surprising or unnatural. The testamentary pattern embraced two distinct phases. In the first phase one or more of the testator's children would in a sense be competing for shares. In such case the testator would be concerned lest any child suffer a diminution of his share in competition with the lineal descendants of deceased children. No such consideration would be involved in the second phase in which no child of his would be living to receive his bounty. We think it most natural and normal that the testator, having discharged his obligation to his children, should view his own lineal descendants of equal degree as a new class standing on a basis of individual equality. In short, we are not persuaded that the pattern which the testator adopted for the first phase of his will was necessarily intended by him to constitute the pattern for his entire will.

When we examine the language employed by the testator in the above quoted support payment clause, we note that a *stirpital* distribution was directed with care

and precision. The annual payments to each child were to be continued "at the decease of each of them, then to all the lineal descendants together, if any, of *each of them*" in an amount "not exceeding for each of them, or all the lineal descendants, if any of *each of them*, (ten) thousand dollars per year."

(Emphasis ours). This language must be compared with that used in the termination clause above quoted in which the testator used the words, "of all of my lineal descendants, if any, then living." It is apparent that although the testator had shown in the support payment clause that he was aware of the language requirements for directing a *stirpital* distribution, no words of similar import appear in the termination clause. This will reflects careful draftsmanship and we view the omission of any clearcut direction of a *stirpital* distribution in the termination clause as significant. See *Mellen* v. *Mellan*, 148 Me. 153, 160, 90 A. 2d 818 (supra). It is contended that the phrase "lineal descendants" had taken on a meaning in the support payment clause which carries over into the termination clause. In the two phases of his testamentary plan the testator had two distinct classes of lineal descendants in mind. In the support payment clause he was providing only for the lineal descendants of those of his children who should die prior to the termination of the trust. If, for example, the last surviving child had left lineal descendants, they would have had no benefit from the trust. Key words in producing this result were as we have noted the italicized "of each of them." In the termination and final distribution phase the testator's concern was for all of his own lineal descendants, a class or group more broadly based and restricted only by the limitations fixed by the incorporated statute. In short the "lineal descendants" provided for in the support payment clause were by no means intended by the tes-

tator to comprise the "lineal descendants" who were to divide the corpus of the estate.

In *Lermond* v. *Hyler*, 121 Me. 54, 115 A 546, the will before the court for construction contained the provision, "and after the death of (a niece) and (a nephew) I give, bequeath and devise all of my property to my then heirs, as provided by law." (Emphasis ours). There were in fact two other persons who were also named as beneficiaries during their respective lives. Upon an analysis of the testamentary plan, the court concluded that the true intent of the testatrix was not precisely expressed by the language employed in the termination clause. The court interpreted the will as though it had provided that after the death of all of the life tenants the remainder should be distributed to those persons who would have been the heirs of the testatrix if she had died immediately after the death of the last surviving life tenant. The court cited with approval *Proctor* v. *Clark*, (1891) 154 Mass. 45, 27 N.E. 673, 12 L.R.A. 721, in which a similar result was reached.

In *White* v. *Underwood*, (1913) 215 Mass. 299, 102 N.E. 426, the will provided that upon the death of the life tenant a trust should terminate and the remainder be distributed "among my heirs at law, according to the statutes which shall then be in force." The court held that the statute should be applied as though the testator had died immediately after the death of the life tenant. A like result was reached in *Welch* v. *Howard*, (1917) 227 Mass. 242, 116 N.E. 492.

Where a trust terminated at the death of a life tenant, the remainder over was to "those persons to whom it would be distributed and to whom it would pass by descent under the statutes of the State of Maine regulating the descent and distribution of intestate estates." The court held that the statute should be applied as of the date of death of the life tenant and implicity as though the testator's death had occurred at that time.

Merrill Trust Co. v. *Perkins, et al*, 142 Me. 363, 53 A. 2d 260. See also Annotation in 30 A. L.R. 2d 406; Restatement of the Law of Property, Sec. 308, Page 1719 et seq.

While conceding that the results in the above cited cases are all correct on their particular facts, the proponents contend that a different conclusion must be reached when, as here, the testator uses the words "lineal descendants" rather than the words "heirs" or "next of kin" or similar words importing death.

In Pennsylvania the court had occasion to consider the same problem. A statute provided that a remainder over after a life estate conditioned to vest at the termination of the life estate in the testator's heirs or next of kin or the persons there unto entitled under the intestate laws "or other similar or equivalent phrase" should be construed as passing to the persons qualifying under the statute as of the termination of the life estate and not to the persons qualifying as of the time of the testator's death. The will before the court for construction vested the remainder over at the termination of a life estate "in (the testator's) lineal descendants according to the intestate laws of the state of Pennsylvania." The court held that the language employed in the will constituted a phrase "similar or equivalent" to the specific expressions found in the statute. *In re Bonsall's Estate*, (1927) 288 Pa. 39, 135 A. 724. We are satisfied that whatever rule of construction would have had application if Mr. Cassidy had made his gift over to his heirs or next of kin as of the time of vesting should have made like application where as here he described the ultimate takers as comprising "all of my lineal descendants, if any, *then* living, in the same manner and in the same proportions as shall *then* be provided by the *then* existing laws of the State of Maine *for the descent among lineal descendants* of intestate property, real and personal." (Emphasis ours).

The proponents direct our attention to the fact that in the original will the above quoted portion of the termination clause was followed by this sentence (later revoked by codicil):

"But if at the termination of this Trust, as aforesaid, that is to say after the decease of all of my said five named children, there should not at that time, namely at the decease of the last survivor of my said five named children, be any of my lineal descendants then living, then and in that event, all my said estate shall be divided among those persons that shall then constitute my heirs at law, under the laws of the State of Maine, as they shall then exist for the descent of intestate property, real and personal."

The proponents argue that since this clause alone, appropriately phrased, would under the rule in Lermond have sufficed to effectuate a *per capita* distribution among the lineal descendants of equal degree, the testator must have some definite purpose in mind when he provided first for the lineal descendants and then for his heirs at law. This purpose, they contend, could only have been to provide a *stirpital* distribution among lineal descendants. The proponents would read the phrase in the above quoted portion of the termination clause, "of all of my lineal descendants, if any, then living," as though the testator had said, "of all of my *groups of* lineal descendants, if any, then living." We are struck at the outset by the fact that the testator did not use the words, "groups of" or any other equivalent words even though, as already noted, he had recognized the necessity in the support payment clause of making clear a *stirpital* intention. In our view the testator placed his potential heirs in two categories, lineal heirs and collateral heirs. That by his reference to "heirs" in the last sentence of the original termination clause he meant "collateral heirs" finds some support in the fact that when by codicil he revoked this last sentence,

he substituted a gift over to his sister who was of course a potential collateral heir. The testator, having resorted to the descent statute for the determination of the takers after the death of his children, may have wished to forestall even the remote possibility that the statute might be so changed as to destroy the priority afforded to lineal descendants over collateral heirs. The language of his will would preserve that priority for his lineal descendants even though the statute by some later amendment might not.

We can discover no sound or compelling reason for reaching any different result in the construction of this will than was reached in *Lermond* v. *Hyler*, 121 Me. 54, 115 A. 546 (supra). Certainly Mr. Cassidy did not intend to incorporate by reference portions of the descent statute which would serve no useful purpose in resolving the dilemma for which it was invoked. Since he had called the statute into action to deal with a situation which could only arise after his children had died, it would be incongruous to permit the statute to operate as though at least one child were still living. If on the other hand we apply the rule in Lermond, the second sentence of the quoted portion of the descent statute has logical application. As already noted, the sentence reads, "If no child is living at the time of his death, to all his lineal descendants; equally, if all are of the same degree of kindred; if not, according to the right of representation." To effectuate the testator's intention as disclosed by his testamentary pattern, the statute must be applied as though the testator's death occurred immediately after the death of his last surviving child so that the condition that "no child is living" is satisfied. In support of this conclusion we take note of the fact that the legislature itself in enacting the descent statute was providing for two very different situations. In the first sentence of the quoted portion it established the flow of property in cases where children are competing

for shares or lineal descendants of more remote degree are competing with one or more children. The legislature provided in the second sentence a very different result to obtain when no children are competing and the takers are all lineal descendants of more remote degree. The latter situation is the very one for which the testator was providing when he invoked the statute to fix the shares of his own lineal descendants of more remote degree. We are satisfied that it was the future legislative method of resolving this dilemma which the testator desired and intended to employ and adopt as a part of his testamentary plan. He had already provided his own scheme of distribution where his children were involved and required the aid of no legislative plan in so doing.

Both proponents and opponents vigorously assert that the language of the will is clear and unambiguous and requires no resort to outside circumstances to resolve ambiguities. Since, however, the claimants reach diametrically opposite results in their interpretation of this language, we must assume that the will may in some respects be ambiguous and some examination of the background against which it was conceived may not be amiss. At the time Mr. Cassidy executed his will he had no grandchildren. When he executed his codicil he had but one, the present Jane Murphy Sullivan. The marriage of her mother, the then Mary Cassidy, seems to have evoked a storm of protest and disapproval as a result of which the testator virtually cut himself off from any association with either this daughter or her child. Mr. Cassidy never knew his other grandchildren. We think it most unlikely that the testator ever intended that a grandchild who suffered some loss of his affection because of her mother's disregard of his wishes should receive substantially more of his estate than other grandchildren whose parent had never seemingly incurred such marked parental displeasure. We think that it is normal and natural for a testator to think of

his prospective grandchildren, yet unborn, in terms of individual equality as recipients of his bounty so long as they are not in competition with any child or children of his. The legislature seems to have made the same assumption in establishing its pattern in the second sentence of the quoted statute. We find nothing in the attendant circumstances which would tend to resolve any ambiguity in favor of a *stirpital* distribution among the testator's grandchildren.

We conclude that the net estate should be distributed by the trustee among the six claimants *per capita*.

Case remanded to the Superior Court, for an order for judgment in accordance with this opinion. Costs and reasonable fees to counsel for the trustee and to counsel for the several defendants to be fixed by the sitting justice below and ordered paid by the trustee and charged in his probate account.

WILLIAMSON, C. J., did not sit.

Civil Action, Docket No. 1692

STATE OF MAINE

PENOBSCOT, ss. SUPERIOR COURT

EDWARD P. MURRAY, *Trustee*
Under Will of John Cassidy

vs.

JANE MURPHY SULLIVAN, EDITH RICE DYER,
JOHN CASSIDY, BARBARA ANN CASSIDY,
ROSELLE MARIE CASSIDY FLYNN,
and JOAN CASSIDY STETSON

FINAL DECREE

Due notice of the time and place of hearing having been acknowledged by counsel of record for all of the parties to the Complaint, and it having been found by the Court that such notice was duly given to all of the parties to the Complaint; this cause came on to be heard in accordance with the decision and mandate of the Supreme Judicial Court of Maine in the cause, certified to the Clerk of Courts for the County of Penobscot on March 26, 1962.

IT IS ORDERED, ADJUDGED AND DECREED, THAT

1. The plaintiff's Complaint is sustained, with the costs and expenses of each of the parties to the Complaint, including reasonable counsel fees as hereinafter fixed, to be paid forthwith by Edward P. Murray, the Trustee under the Will of John Cassidy, from the body of the trust.

2. The true construction of the Will of John Cassidy and the codicils thereto is that, upon the decease of the last surviving child of John Cassidy, namely Lucille O'Brien who died June 9, 1961, all of the estate of John Cassidy, in whatever form the estate shall then be, shall vest and has vested in and become the property of the lineal descendants of John Cassidy, namely Jane Murphy Sullivan, Edith Rice Dyer, John Cassidy, Barbara Ann Cassidy, Roselle Marie Cassidy Flynn, and Joan Cassidy Stetson, one-sixth each.

3. Edward P. Murray, as Trustee under the Will of John Cassidy, after the payment of the costs and expenses of the parties to the Complaint, including reasonable counsel fees as hereinafter fixed, and after reservation only of sufficint funds to defray all costs, including taxes, if any, to be incurred in the distribution as hereinafter directed, is directed to pay over and deliver the body of the trust and all accumulation of income thereon, in equal parts, to the lineal descendants of John Cassidy, namely: Jane Murphy Sullivan, Edith Rice Dyer, John Cassidy, Barbara Ann Cassidy, Roselle Marie Cassidy Flynn, and Joan Cassidy Stetson.

5. The Court further orders and decrees that the Clerk of Courts for Penobscot County shall forthwith cause a certificate or abstract of this Final Decree, incorporating therein Paragraphs numbered 2 and 5 of

this Final Decree, to be recorded in the Registry of Deeds of Hancock, Somerset, Penobscot, Piscataquis, Aroostook and Washington Counties in the State of Maine, and Carroll County in the State of New Hampshire, being all counties wherein real property which is subject to the trust is situate, and such certificate shall, upon the recording in the several Registries of Deeds, be final and binding upon all persons as to the division of the interests in the title heretofore held by John Cassidy; and inserting therein that Edward P. Murray of Bangor, Penobscot County, Maine, is the duly appointed and qualified Trustee, authorized to execute deeds, bills of sale, transfers of stocks and bonds, and such other instruments as are necessary to effectually transfer title of the assets of the Estate of John Cassidy remaining in the hands of the Trustee, to the persons entitled thereto according to this Decree.

Dated, at Bangor, Maine, this 9th day of July, 1962.

/s/ JAMES P. ARCHIBALD

.....

Justice, Superior Court

STATE OF MAINE

Supreme Judicial Court
sitting as a Law Court.
June Term, 1962.

R Petition for Review of Law Court Decision
in
MURRAY VS. SULLIVAN, et als

Consideration having been given to the Petition for Review of the Decision of the Law Court, filed by EDYTHE RICE DYER, one of the defendants in the case of *Murray* vs. *Sullivan, et als*, opinion filed March 26, 1962, it is

ORDERED that said petition be and it hereby is denied.

/s/ WALTER M. TAPLEY, JR.

.....

For the Full Court
(excepting Chief Justice Williamson
who did not sit on the case.)

Received and filed
June 19, 1962

F. A. Johnson, Clerk Law Court

Office-Supreme Court, U.S.
FILED
NOV 15 1962
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 533

EDYTHE RICE DYER,
PETITIONER,

v.

EDWARD P. MURRAY, as successor trustee under the Will of the late JOHN CASSIDY, JANE MURPHY SULLIVAN, ROSELLA MARIE CASSIDY FLYNN, and JOAN CASSIDY STETSON,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MAINE, SITTING AS THE LAW COURT

MEMORANDUM IN OPPOSITION

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TABLE OF CONTENTS

	Page
Brief in Opposition	1
Appendix A	4
Petition to Supreme Judicial Court of Maine	4
The Issue	4
Intention	7
Facts re: Cassidy Will	26
Letter of Dec. 2, 1918, M. Laughlin to Edgar A. Simpson	32
Statement, Harold Murchie	35
Letter, Edward F. Merrill to J. W. Cassidy	36
Letter of June 20, 1938, W. R. Pattengall to Ralph A. Dyer, Jr.	38
Decision of Supreme Judicial Court of Maine	39

Table of Citations

Constitution of the United States, 14th Amendment	3
Saunders v. *Shaw*, 244 U.S. 317, 320, 61 L.Ed. 1163, 1165	2
Stern and Gressman's Supreme Court Practice, 2nd Edition, page 221	2

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RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MAINE, SITTING AS THE LAW COURT

MEMORANDUM IN OPPOSITION

The Respondents, Joan Cassidy Stetson, Roselle Marie Cassidy Flynn, Barbara Ann Cassidy and John Cassidy, deem it unnecessary to file the usual Brief in Opposition and instead they file this Memorandum as they consider

this case clearly to be the kind referred to in *Stern and Gressman's Supreme Court Practice, 2nd Edition,* Page 221 as the type of case "in which a very short statement of pertinent facts and argument will clearly demonstrate that the case is not of the sort to be reviewed by the Supreme Court" and that "the Court will accept a short memorandum without headings in such cases".

The most cursory reading of the Statement of the Case in the Petition makes it obvious that the issue involved in this case is the construction of the Will of a Maine decedent. The Will was executed in Maine and the decedent was domiciled there at the time. It is impossible to conceive a case in which it is more obvious that no federal question whatever is involved. No federal statute is involved and none could be nor was any state statute which in any way is in conflict with any federal statute or the Constitution of the United States. The petitioner's attempt to invoke the Fourteenth Amendment is ridiculous in the extreme. It needs no citation of authorities to support the rule that the decision of a state court on a matter of local law, however erroneous, does not lay the basis for jurisdiction in this court. If it did, the court would be overwhelmed with litigation. This petition is about as close to being frivolous as it is possible to be.

If this were not enough, it is equally apparent, from the record, that the petitioner never, at any time, raised a federal question in the original proceeding. The petitioner attempts to get around this by invoking the so-called "surprise doctrine". In this case the "surprise" appears to be solely that the case was decided against the petitioner. This hardly complies with the requirements of the "surprise doctrine". See *Saunders* v. *Shaw*, 244 U.S. 317 at Page 320, 61 L. Ed. 1163 at Page 1165 where the court says, "The question remains whether the writ of error can be maintained. The record discloses the facts but does

not disclose the claim of right under the 14th Amendment until the assignment of errors filed the day before the chief justice of the state granted this writ. Of course ordinarily that would not be enough. But when the act complained of is the act of the supreme court, done unexpectedly at the end of the proceeding, when the plaintiff in error no longer had any right to add to the record, it would leave a serious gap in the remedy for infraction of constitutional rights if the party aggrieved in such a way could not come here."

Obviously that is not the case here. The "surprise", if any, in the case at bar, of which the petitioner complains, was apparent after the original decision of the Maine Supreme Judicial Court which gave petitioner ample opportunity to raise any federal question in her petition for rehearing. Yet that no more raises a federal question than all the rest of the proceedings. See Appendix A. There was a good reason for this for as we have seen supra no federal question whatever is involved.

For these reasons, the Respondents, Joan Cassidy Stetson, Roselle Marie Cassidy Flynn, Barbara Ann Cassidy and John Cassidy, respectfully request that the Petition for Certiorari be denied.

Respectfully submitted,

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Of Counsel
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Appendix A

PETITION TO
SUPREME JUDICIAL COURT OF MAINE
For Review re:
ESTATE OF JOHN CASSIDY

On behalf of:
EDYTHE L. DYER

June 5, 1962

THE ISSUE

The apparent question (of the moment) of which we are concerned with, is (PROPORTION). The proportion of the vested estate, that each of John Cassidy's lineal descendants, are to receive.

The wills reference to the statute, incorporated the statutes double function, (manner) and (proportion).

Note- The manner is provided for in the will, the "lineal descendants" are known.

Note- The Cassidy heirs are now known without question.

Note- The issue is *proportion.*

Mr. Cassidy in (1906) had no way of knowing what combination of his lineage would survive him or whom he would survive.

Note- *Nobody questioned the statute prior to 1906:*

There was no question about the descent statute, *meaning anything* except, exactly the way it appeared to read. If he had intended otherwise his attorney would have said so. He must have believed he accomplished it all in the statute. (All Maine cases recently cited were decided after the will was made; actually after the testators death).

Mr. Cassidy provided for *his children,* as he believed best (in a trust) and intended to vest the remainder of his estate in his lineal descendants, (whoever they might be, in whatever combination and nearest relationship to

him, that they might be, after the termination of his trust), after the decease of his last child.

The Possible Lineal Descendants: of John Cassidy when will was made. (1906) were many.

Contingent Ways Estate Could Have Vested:

Testator to predecease:

1- All of his children
2- Some of his children (only)
3- Some of his children and one grandchild
4- Some of his children and two families of one or more grandchildren
5- Grandchildren only
6- Grandchildren and one great grandchild
7- Grandchildren and two or more families of one or more great grandchildren
8- Great grandchildren only
9- His Sister, *Ellen Hurley* (*similar as above*)
10- His Brother, *Barney Cassidy* (*similar as above*)
11- No lineal or collateral heirs
12- Also possibility that all or some of these people might have (predeceased the testator).

Obviously Mr. Cassidy believed with good reason that by adopting the descent statute he had a ready made, reliable *crutch* for his *will*. That his estate would be distributed on a per stirpes basis unless all of his children should predecease him, — which would be a most unlikely contingency.

Every ray of light cast from his will showed (per stirpes) family equality. Having no countervailing legal precedents, his attorney, Matthew Laughlin, and he, read the Descent Statute at its *face value* in (1906), believing and hoping to bring about a result, as they understood the

statute, to determine the manner and proportion for each contingency.

Proportion

On this point the statute regarding his grandchildren is *specific*. Stating that the remainder of which Mr. Cassidy died seized, "shall descend in equal shares to his children (trust prevented) "AND" to the lawful issue of a deceased child by right of representation.

This the statute so provides and was his assurance that equality between the families of his children would be preserved, unless all of his children should predecease him (which was most unlikely). The second sentence in the statute was his safeguard (AGAINST) a per capita distribution unless all of his children should predecease him.

It is clear that Mr. Cassidy intended distribution by right of representation. He obviously tied his will to the statute, *relying* upon it to accomplish exactly what it said.

The Statute

> Therefore it should be interpreted literally as it appears and previous to any reported decisions from the Supreme Judicial Court of Maine, that the actual date of a man's death (*could* or *might*) be *artificially* advanced, thereby in effect bringing about a result which he could not *reasonably anticipate* (in 1906). We owe him the benefit of the doubt.
>
> This is also one of the reasons we feel justified in requesting a review for further consideration by the court of *relevant FACTS*.

Believing that the court is interested in having the Cassidy case decided right, with the utmost of respect for the court's findings, and with these humble words from untrained legal minds, we respectfully request the court to take another look and if it pleases the court to grant a formal final review.

We trust you will accept this work of sincere people who

believe with conviction, that this petition is justified and worthy of your further consideration.

Edythe & Ralph Dyer
Bangor, Maine
June 5, 1962
(s) Edythe Rice Dyer

Intention

Of course it is now impossible to know or guess what John Cassidy had in mind when he wrote his will and codicil, now that he is dead. However his intentions, wishes and directions are represented by *his will*, which speaks for itself as of the date of his decease.

We are reliably told that Mr. Cassidy was a successful, intelligent businessman, apparently normal in every way and a good respected citizen of Bangor, Maine. Therefore he was probably much the same as many other businessmen.

The obvious question is: — what would another man of equal stature or even you or I do under similar circumstances:

Let's suppose for a moment that my name is John Cassidy, I have just written the last codicil to my will, the date is May 4, 1910, I am (68) years of age. I am worth approximately (4) million dollars. I have (5) living children, my (3) daughters are not going with or marrying the people I had hoped they would. Only one of my children, (James W. Cassidy) is alert to the ways of business. My children are jealous and quarrelsome. My attorney has helped me write this my last will.

Briefly it does some of these things for me *

1- "I, John Cassidy, hereby made, publish, and declare this my last will and testament, *herein disposing* of *all my estate*, real, personal and mixed."

* "quoted in part" — (added comment)

"After payment of all just debts, funeral charges and expenses of administration, *I dispose* of *all the remainder* of the estate *as follows*"

2- I "declare this my last *will* and testament "*herein disposing* of all my estate".

3- "*I dispose of all the remainder of my estate as follows*"

"(that I own or *possess at the time* of my decease)"

4- "I *give*, bequeath and devise to my son and my daughter to have and to hold to them and their heirs, assigns and successors, *forever* in *trust*, however for the following purposes and *trusts*". (Whereas I have (5) children, a grandchild and I am a widower).

5- My "said trust shall continue until the decease of all my children *namely*, said James W., Mary A., Rosella, John F. and Lucy C. Cassidy, all of said Bangor", (here I *recognize* and *name my* children, whom I *expect* and hope *will be living at the time of my decease*.)

6- "My trustees are to control and manage all my said estate real, personal and mixed". "In brief, without further specification in detail, my said trustees shall have full power and authority to do and perform in the same manner *as an absolute owner would*".

7- "I expressly direct that neither my said trustees, nor their successors, shall have *any power of authority in any manner whatsoever* to convey any part of any of my real estate, of any name or nature, wherever found, or situated, that *I* now own or possess or may own or possess *at the time of my decease*." "This express prohibition against any such conveyance of real es-

tate to continue *as long* as this *TRUST continues*, namely, until the decease of each and all of my aforesaid five children, above particularly named":

Therefore there can be no doubt that:

A- no part of my estate will vest a fee in any of my *children*, during their lives.

B- that My particularly *named* children *are expected* to be *living* "at the time of my decease".

C- and that my *will* speaks and directs my trustees "at *the time of my decease*"

D- the whole directive applies only to *my trustees* and *my children*.

E- the trust terminates, after the decease of my last child.

8- "I direct that in no event shall *any* trustee under this will, at any time, receive any commission upon the body of my estate or its income". (I am not foolish, this is one of the reasons I have my own trustees on a salary basis.)

9- "During the continuance of this *trust*, the trustees of *my estate* shall provide for the comfortable *support* and *maintenance* of *each* of my said five (named) children, during the life of *each of them* "AND" at the decease of each of them, *then* of the lineal descendants *together*, if any, of each of them, to an amount not exceeding for each *child* — $10,000.00 per year, *beginning at the time of my decease*.

Special Notice (is given to this paragraph, especially to the *words used* and the style of composition used).

A- "my estate", — I consider it to still be my property in trust.

B- I am providing (only) for the *comfortable support* and maintenance of *each* of my said five named children.

C- *Notice;* that no title or fee passes.

D- Notice that there is no doubt about the fact that I recognize, expect, hope and intend to provide for *my said five named children, then living.*

E- "*beginning at* the *time of my decease*".

Note: The words "my children"
"during the life of each of them"
"AND"
"*and*, at the decease of each of them"
"*then* of the *lineal descendants* together of each of them"
"lineal descendants"
"*beginning* at the *time* of my *decease*"

These words are repeated over and over and will finally be used in the final distribution clause, with equal meaning and intent.

Let's see how they are used next!

10- "In addition to said sum not exceeding $10,000.00 per year, as aforesaid, '*if any one*' or more of my said five children should desire to live apart in a house by himself or by herself in any of my houses, in said City of Bangor, then the trustees of this *will* for the time being, shall designate one of my houses for *each one* of my said *five children*, so requesting it, and after the death of each of my children, for the lineal descendants, if any of *each* of *my* said children, free of rent".

Note A

I direct the same per stirpes style or pattern.

Note B

The words, my "*lineal descendants*" are identified as being "*the lineal descendants of my children*".

Note C

That no title, no fee, no lease passes — they are for all purposes tenants, subject to certain discretionary authority given to my trustees, who are "same as an absolute owner" — the title thereof is in the name of the trustees.

11- "Any income from *my* estate, not necessarily used in carrying out the foregoing provisions of this will, shall become a part of the body of *my* estate, and be invested from time to time by my trustees, *in the same manner* as afore particularly specified."

Note A

Any income from my estate, not used, shall become a part of the body of *my* estate.

Note B

The continued grammatical use of the words, "my estate" "in the same manner".

12- *The Will Termination Paragraph*

A- "*Upon the termination of this trust*"

(A specific "*time*" is directed)

B- "*Namely after the decease of all my five named children*"

(*Note* — an event which must occur at a definite "time" *only after* the decease of all five children)

C- "*All my estate in whatever form the estate shall then be shall then rest in*"

Note

I refer to my estate, in whatever form it shall *then* be.

Note

"All my estate", of which I died seized" — "shall then *vest in*"

D- "*And become the property of all of my lineal descendants*"

Note

at this specific time MY estate shall become the property of

Note

"my" lineal descendants

Note

I limit and restrict all descent *first* and only to MY lineal descendants, not to *MY children*, which I provided for in a *trust*.

E- "*If any then living*"

(lineal or collateral descendants)

F- "*In the same manner and in the same proportions*"

(Note — the same *manner* and *proportions*)

G- "*As shall (then) be provided by the (then) existing (laws) of Maine*"

(Note — intent to use the *laws* of Maine, *then* in effect as a guide)

H- "*For the Descent among lineal descendants of intestate property, real and personal*"

Note

"Descent"; I requested "my" estate *to descend* "in" and "among" — "my" lineal descendants *according to my will* in the same *manner* and *proportions* as provided for intestate property by laws of Maine (then in effect).

Note

I (my trust) retains title to it until "after". "Namely, after the decease of all of my five named children". Only then shall the estate vest *in* "my" lineal descendants. As *directed in this will as of the date of my decease*, for all property of which I died seized.

13- "It being my express intention that no part of the body of my estate real, personal or mixed, shall vest in *any person or persons* until the time above especially fixed for the termination of this trust".

Note A

"(*no part* of the body of my estate shall vest in any person or persons, until termination of this trust)"

Important Note B

*Therefore; cases cited such as *Lermond* vs. *Hyler* 121 Me. 54—are poor guides because no fee or interest passed to Mr. Cassidy's lineal descendants, at his decease (vested—contingent or conditional). The children had no estate to pass from or through their lineal descendants or next of kin, (directly or collateral).

*This case and others cited like it were subsequent to the time Mr. Cassidy wrote his will in 1906.

*Most of the cases pertained to (manner) to uncertain or unknown heirs, not to statutes.

14- *Distribution*

A- (The *eye*, the *hinge*, the focal point of the will revolves around the utilization of the Maine Descent Statute) (as to proportion).

B- *My will clearly states that*
I "hereby make, publish, and declare this my last will and testament, herein *disposing* of all my estate". See (1) and (2).

15- In Brief:
"my said trustees nor their successors, shall have any power in any manner whatsoever *to convey* any part of my real estate" — "*as long as this trust continues*", "*until the decease* of each and all of my aforesaid five children, above particularly named".
"I give and bequeath", — "at the time of my decease", — to my trustees, "to have and to hold" — "forever", — "for the following purposes" — "to *carry out* the *provisions* of *this will*, and to convey and transfer the same, insofar as it may be necessary, to the *persons* who *shall* be *entitled* to the same, as above specified".

16- *Distribution Time*
"After the decease of all of *my* five named *children*, all of *my* estate, in whatever form the estate shall then be, shall *vest in* and become the property of all of *my lineal descendants*"
A- *then* living
B- in same manner and *proportions* provided by
C- *then* existing laws
D- for *descent* among my lineal descendants
E- of intestate property.

Important Note
A- My children, were provided for in the trust; that is terminated upon the death of MY last child
B- The children, have no estate to pass on to *their lineal descendants*

C- However, if any of their lineal descendants are then living, they are also *my* lineal descendants!

D- I reserved the right to (for my own reasons) for my estate to then vest *in* and become the property of MY *lineal descendants* "then living" in the same manner and proportions as shall then be provided by the *then* existing *laws*, for descent among *my* lineal descendants", "as intestate property".

17- All and whatever *right, title* or interest I had, *have* or *reserved*, to my estate, under the terms of my will and which my trustees "defended", "protected" and "preserved", I *now instruct my trustees* to convey and distribute the same:

"to the persons who shall be entitled to the same, as above specified".

18- This being the same property, of which "I died seized", and which I gave, bequeathed, and devised, "at the time of my decease" in my will, to my trustees. Now that all of my children are deceased, 44 years have passed since my decease, there seems to be some question about how. I wanted my will to be modified by the conditions of the Maine Descent Statute.

19- My whole will is obviously dominated by

A- a trust which I created *FOR MY CHILDREN* to prevent them from spending the corpus of my estate.

B- there can be no doubt that I was aware of the fact that I had (5) children living when I wrote my will. (therefore) I did not intend to die without children.

C- nor *did I do so*, as everyone very well knows.

D- nor did I intend for them to die before me.

E- It may be of interest to note that my daughter Rosella died (May 25, 1915) leaving a daughter who was (3) years old when I deceased. This child, her only daughter, was the first of *my lineal descendants* to fall within the final pattern of my will, as the other families would eventually do, in time.

There can be no doubt that Edythe Rice Dyer — (Directly and Immediately) represents me, by *Right of Representation*, as of the date of my decease (March 25, 1918).

Rosella left her child no estate or interest (in my estate) at the time of her decease, (March 25, 1915) BECAUSE I WAS ALIVE.

However Rosella's family share (in my will) went to her *issue*. During Edythe's life she was provided for (the same) as one of *MY children*.

Quote Will: "then to the lawful issue of a deceased child by right of representation".

A- with support and maintenance payments.

B- with the residential provision for a home.

C- AND finally to represent ME, (and or her mother), when my trustees, "carry out the provisions of the

will" — "to the lawful *issue* of a deceased child by right of representation."

Therefore the descent statute must recognize that I intended to die with children and also with (2) grandchildren living prior to my incapacitating illness.

20- All this talk about how I intended to modify my will by finally using the statute is a bit humorous. I would have to die after June 9, 1961 (who knows when) in order to outlive my children — if the (so-called) conditional second half of the statute is used.

The court has assumed that the second part of the descent statute must be applied (quote) "as though the testator's death occurred after the death of his last child" — "so that the condition that no child is living is satisfied".

Something Must Be Wrong!

The second half of the statute is my protection AGAINST a per capita distribution.

If it is assumed that I predeceased all of my children (in order to comply with the so-called second half of the statute) there was no need to invoke the statute.

Because, no child was living at the (theoretical) time of my death.

A- the trust (theoretically) never existed.

B- my intentions in my will for my children and lineal descendants was all wasted effort. My directions and wishes to my trustees are null and void, because my estate would have to vest immediately as intestate property as of the date of my death.

C- My will is incomplete.

D- If I am today dead without a trust or trustees without even the statute (which the trust was to utilize as a guide) then my will lacks clarity.

E- Therefore my estate is intestate from the start. My estate is cast into (involuntary statutory intestacy) as of the actual real date of my death, March 25, 1918.

F- There are no provisions allowed for my sister or the contingent provisions for my collateral lineal descendants whose role in my estate, to this date have been unknown.

The aforesaid theory is definitely not my plan, pattern, intention or wish.

If I die as I contemplated (1918) when I distributed my estate, by will, with the help of *my* trustees everything will read harmoniously.

A fellow cannot expect to die and take his money with him, or to be allowed to get a second chance at a later (legal) death date.

I always thought, the pattern of a man's will and his intentions shown therein was all important. However how a fellow *with children* writing a will or planning to distribute his estate (in the same manner and proportions as prescribed for the descent of intestate property) would be (') if he, (looking right at the statute) planned on utilizing the second half to vest his estate (specific grammatical integrity should answer any doubts about that).

21- The statute reads clearly, with the utmost of simplicity.

A- "The remainder of which I died seized"

B- "The whole shall descend to my children" (deprived by trust)

C- "AND" (and/or) to the lawful issue of my deceased child by right of representation" (which is the only way Edythe Rice Dyer can take — whereas her mother pre-deceased the testator).

D- "(If) no child is living at the time of my death (1918)"

E- "To all my lineal descendants equally, if all are of the same degree of kindred". (This sentence would have applied if (I) had died *without children.* The estate would have (then) vested in 1918 to my *lineal* or *collateral* descendants, then living, *no* trust would have ever resulted). — If *none* of my children were living at that time.

The statute continues:

F- "If not according to the right of representation". This sentence would have been used if my children were all deceased and my surviving (1918), lineal or collateral descendants were not of equal degree of kindred.

22- *Thus:*

The whole statute is logically *utilized* (as any average lay man would use it) — nothing is omitted or offended. No statutory requirements are assumed which require me to die (in order to utilize the statute) the will takes care of that automatically. There is only one way the statute can be used without false assumption. We must remember that the estate *never vested* in any of

my children or lineal descendants prior to June 6, 1961.

We must realize that the intestate statute (is recognized to be) designed by the legislature to function, only at the death of (any man) intestate. I would be apprehensive about applying it to an estate (44 years) after a man's death. It is just not cricket to do so, the prescedent is precarious and seems somehow basicly untruthful to actually assume a man died 44 years after his actual death. Taxes and things being as they are, might get an estate into trouble.

The statute is the *canon of the law* — a standard — a pattern prescribed for all men alike.

If I wrote a will copying or utilizing the statute after my last child's death as a vehicle or method for my convenience to "then" distribute *my estate* to *my* lineal descendants (that was my will speaking) as it spoke and has spoken ever since March 25, 1918, not the statute.

The statute should not compromise itself in whole or in part to "assume" I died in 1961 so that a part of the statute can justify the distribution of my estate in some questionable ambiguous way.

A mold, a form, a pattern can only fit exactly that which it designed, a statute is equally fatal to deviation.

The descent statute should not be applied "so that the condition that no child is living is satisfied", nor do I believe the legislature ever heard of or contemplated such (for a man who died in 1918 to be assumed to die in 1961 so that the statute can be applicable).

There are Two Considerations in The Will

(A) Did I intend to die March 25, 1918 with children and vest my estate in my trustees for them to later distribute (for me) as "an absolute owner", to *my* lineal descendants then living —

(If so then I intended to use the first part and main body of the descent statute)

OR

(B) Did I intend to use the descent statute after the death of my last child as though I died without children (presumably after) June 1, 1961.

(If so I intended to use the (IF) condition in the second part of the statute.)

The Descent Statute (to function) asks only three questions about John Cassidy.

1- When did I die?
2- Did I leave a widow?
3- Did I die with children?

That is as far as the statute goes — any questions or conditions after that are not to be considered, because they are irrelevant to the FACTS.

Final Distribution:

The EYE — the HINGE, the focal point obviously evolves out of my whole will, (the style and pattern) (the directions) the (continued use of synanamous words) and the (descent statute) as a standard legally accepted, and a ready made guide for my trustees.

With all respect for the court's assumption, it is difficult to see where I intended to employ the 2nd future legislative method, unless all of my children should die before me.

The second portion of the statute can only be utilized if we assume I died in 1961. Why should we want to assume I died in 1961, in order to utilize the (second legis-

lative method)? The *will* does not request it, the *statute* does not demand it.

Although the will spoke and functioned as of the death of the testator, it only requested the use of the law in effect *as of 1961* which was the same as in 1918, as I presumed it more or less would be.

It is possible therefore, without offending the *will* or the statute to say that the will *spoke* in *1918* AND *used* the *1961 statute* exactly as directed.

If we admit that I died in 1918, which I did, we *can* still *use* the *1961 statute*, the *whole* statute then has *continuity* and meaning *in every word*.

To Prove: rationally the estate can only be distributed *by right of representation*, "AND to the lawful issue of a deceased child".

Let's ask:

Q. Why does the court want to satisfy the condition "that no child is living"?

A. Because that was required in MY *will* and the basis on which the trust was created, continued, functioned and terminated. Whereas I did have children living at the time of my death, Mar. 25, 1918.

Q. If the condition was in the *will;* and the will *spoke* and functioned effectively as of MY death; carrying out MY every wish; and the trust could not terminate until after the decease of all of my said five named children, then why isn't that what I wanted?

A. It is!

Q. Why involve the statute with the *termination condition* in the *will*? (quote court) "so that the condition that no child is living is satisfied?"

A. The double function of the statute, (manner) & (Proportion) is utilized only as to (proportion) — the "heirs" admittedly are known. (manner) and the ter-

mination clause in the will, it should not be involved. The *will* and the statute each *speak for themselves.*

All the testator asks of the statute (in the will) is that it shall be adopted and applied, "in the same manner and *proportions* as (then provided by the then existing laws of Maine) for the descent among lineal descendants of intestate property real and personal".

My named children are presumed and presumable accepted as *in being* as of the date of my death (although one was deceased with issue).

Note.

The will requires a preceding condition or event to occur in order to vest the estate.

The statute prescribes only manner and *proportions,* if certain facts exist at the decease of the testator.

(Two different situations exist.)

It is "jury certain" that in the body of the statute — "the whole shall descend to his children, AND" (if none living) (and/or) to the lawful issue of a deceased child by right of representation, is what he intended. Just exactly as the statute reads and the way all the rest of the will reads. We need only to admit that Mr. Cassidy died March 25, 1918, when he did die, and the whole ambiguous dilemma is as simple as truth itself.

IMPORTANT NOTE

One word in the statute and the will — is the eye — the hinge—the key, it is "AND" it is used all through the will and statute.

Special Notice — is directed to the *support payments clause*: which states in part,

> "During the continuance of this trust, the trustees of my estate shall provide comfortable support and maintenance of each of my five children (named) during the life of each of them *"AND"* at the decease of each of them, then to the lineal

descendants together, if any, of each of them. (per stirpes).

The Residential Clause

The trustees "shall designate one of my houses for each of my said five children, so requesting it "*AND*" after the death of each of my said children, for the lineal descendants of each one of my children". (per stirpes).

The Distribution Clause (Statute)

"The whole shall descend, in equal shares to his children (excluded by trust) "*AND*" (and/or) (*then*) to the *lawful issue* of a *deceased child* by right of representation". (per stirpes)

The Will says in part:

"after the decease of all my five named children, all my estate in whatever form the estate shall *then* be shall then *vest in*. "AND" become the property of all of *my* lineal descendants". (per stirpes)

Note the similarity and identical form

In the statute and the will, the continuity of both are tied together by the word ("AND").

Any average intelligent man would find it difficult to interpret this simple language other than just the way it reads.

Perhaps (over simplification) is the factor which has caused many minds to look for complicated legal meanings.

Surely, a testator would seek simplicity for fear the will would want for clarity, which might cast it into statutory intestacy, defeating the testator's wishes. Incidentally, in event the estate was declared intestate, the result would be a (per stirpes) distribution by right of representation, which is not inconsistent.

The preponderance of (worthier title), logical evidence

and FACT appears in favor of (simplification). The bulk of opinion is in favor of per stirpes distribution by right of representation, as shown all through the will.

Will Directions (In Brief) by John Cassidy

A- "Upon the termination of the TRUST
B- after the decease of all of my said five named children
C- all of *my* estate
D- in whatever form the estate shall then be
E- shall then *vest in*
F- all of *my lineal* descendants
G- then living
H- in the same manner and proportions
I- as shall then be provided
J- by the then existing laws (1918-1961)
K- for the descent among lineal descendants
L- of intestate property
M- it being *my* express intention
N- that no part of the body of *my* estate
O- shall vest in any person
P- until the time above especially fixed for the termination of this trust
Q- and at the termination of this trust, as aforesaid especially provided"

"MY TRUSTEES"

R- "for the time THEN being
S- shall *make all necessary conveyances* and transfers
T- to carry out the provisions of this will
U- insofar as it may be necessary
V- *to the persons* who shall be entitled to the same, as *specified"*.

Mr. Cassidy obviously repeatedly refers to *"my estate"*, although he presumably is dead and his estate is bequeathed and devised forever in trust. (Subconsciously) he intended to and did direct (how — (when) and to (whom) *his* estate shall vest. HIS TRUSTEES were to him only his

custodians who "shall make all necessary conveyances" — "to carry out the provisions of this will" "*to the persons* who shall be entitled to the same".

This man came as near as any man can, to *taking his money with him*, even after death.

There can be no doubt that his *will spoke*, as of the date of his death.

There can be no doubt that he intended to die (with children) and most certainly with (lineal descendants) — (direct or collateral).

There can be no doubt that "he" instructed *his* ("absolute owners") his trustees, who were his (alter ego) to act as he would — to deprive his children of any (fee) or transferrable estate. *HE* retained title in his trust, until all of his children were deceased, and then He (as of the date of his death) directed that "My Trustees" — for the time Then being — shall make all necessary conveyances and transfers, "to the persons who shall be entitled to the same, as *specified*" — Today the (manner), the lineal descendants are known.

The specified proportions, — are equally crystal clear.

(Namely) *as Specified in the Descent Statute.*

"And (and/or) to the lawful issue of a deceased child by right of representation".

Edythe & Ralph Dyer

June 5, 1962

Facts re: Cassidy Will

It would be difficult to assume the testator died in 1961 — whereas, his children and lineal descendants must be the heirs of a deceased person (no one can be the heir of a living person!)

Fact — If the statute is to be used — or applied it must be applied as the legislature intended and wrote it to be used. Assumption is not a fact.

Fact — The statute was protecting Mr. Cassidy and reserved for him (with or without his will) a place for his estate to go, as of the date of his death. His estate could have terminated (without a trust) in event his will was lost or voided.

Fact — If this will (or any other will) was declared void; for any reason, the estate would be cast into statutory intestacy; it would vest as of the date of the death of the testator. (Mar. 25, 1918 for Mr. Cassidy).

Fact — Whether the will spoke in 1918 or 1961 would not effect the final distribution, the testator died in 1918. The statute is built around that fact.

Fact — The doctrine of worthier title and the common law rule of property, rather than construction, provided without equivocation that a man cannot make his own heirs his purchasers (60F 21-29) (69NH372).

Fact — All contingent remainders require a reversion in the conveyor or as long as the remainder is contingent.

Fact — A contingent remainder must be created *at the same time* and *in the same instrument* as the prior particular estate (if one was created).

Fact — Remaindermen — always take as purchasers! Joint tenants are always purchasers, Joint Tenants are never created by descent.

Fact — Mr. Cassidy was not stupid, he was not foolish, he and Matthew Laughlin, his attorney, read the "whole" statute. He knew that he estate would not vest until his children were all deceased and the trust was terminated. That was the way they expected and directed it.

Fact — They looked at the descent statute and created a trust *for* his children, on the premise that he *would have* children living at the time of his death.

Fact — Mr. Cassidy and his attorney, understood what the second part of the descent statute said: namely — "If no child is living at the time of his death" — that as a

condition, was irrelevant, to what Mr. Cassidy was trying to accomplish. Because the trust and provisions for final distribution to "his" lineal descendants were based *UPON THE FACT THAT HE DID HAVE* children living at the time of his death. That is the way he understood the statute to read. They would not consider the unnatural ("if *no* child is living at the time of his death").

Fact — Matthew Laughlin, Mr. Cassidy's attorney, admitted under oath that Mr. Cassidy intended for his estate to vest in his heirs at law, if no child was living at the time of his death.

Fact — Property acquired by (descent) is property which the law, upon the death of the ancestor, casts on the heir. *Orr* v. *White*, 6 NE 9 9 "Title by Descent" Blacks Dic. 3rd Ed.

Fact — Mr. Cassidy and his attorney could not intelligently (looking at the statute) set up a trust "for" his children, and at the same time expect, at its termination (with a straight face) to expect anyone to apply the second half of the statute. Which reads "If No child is living at the time of his death". He would not build a trust — carefully provide lifetime income and homes for his children and "his" lineal descendants (on a per stirpes basis), and rationally expect his estate to be settled as though he died without children or at some other date than his actual date of death. It is incredible, impossible, it was not his intention.

Fact — The second part of the descent statute states a condition: "If no child is living at the time of his death", if factually answered, it leaves only the first part of the statute effective. Because the second half is irrelevant, never intended to be used and is in violent conflict with a normal man's interpretation of simple grammatical words.

Note — If two constructions may be put upon a provision in a will, one of which will violate an inflexible rule

of law and the other not, the construction which will not offend the rule is to be adopted by the court. *Towle* v. *Doe*, 97 Me. 433.

Fact — Any "assumption" or conclusions not based upon *fact* is false, and could lead to anywhere.

A man dies as of the date of his death not at the termination of his trust. If he died leaving children — then he died leaving children. That is the basis or starting point for all considerations. If Mr. Cassidy died without children then the trust was never created, because the estate would have vested prior to the trust, as any intestate estate.

Fact — It is impossible to utilize the statute, or the trust; — the estate is intestate from the start; — (unless it is recognized that Mr. Cassidy did leave children).

The ultimate fact, the fundamental determination for Mr. Cassidy's whole consideration, was his children. *AND* his lineal descendants, AND the first consideration in the *statute*, for a man with children, at the time of his death.

To alter the death date or to assume a different date — is to remove the ultimate and principal object of inquiry. The material substance, the corpus delicti, the foundation for the statute; the man's prime thoughts and intentions. His wishes when he wrote the will, were based upon the fact, — that he knew and hoped that he would have children living at the time of his death. He knew and *surely hoped* the (IF) condition in the statute would not apply to him (if no child is living at the time of his death). To Mr. Cassidy this may have been a grim possibility, but surely it was not his plan or *intention* to utilize this part of the statute.

Fact — The Maine Legislature did not write *parts* of the law for Mr. Cassidy. The Maine Descent Statute is well written, practical and its mechanical parts are synchronized to be constant, the first part of (R.S. 1954 Ch.

170 — Sec. 1, Subsec. II) cannot be split into halves to satisfy or convenience a situation. Because there is no two halves, there is only the body of the statute, and two (if) conditions, all must be used together. The body of the statute, cannot be dropped completely and the (if) condition substituted for the whole statute.

The statute fixes its own rules, and by these rules we must be governed. *Messer* v. *Jones*, 88 Me. 353 (67 Me. 583) (45 Me. 115).

In brief:

The whole conception of the matter has been "confused" when in fact the issues are as simple as truth itself.

1- The statute spoke in 1961, the will speak in (1918 and/or 1961).

2- the estate did vest as of the termination of the trust 1961.

3- after the death of the last child

4- But, not, in the (manner and proportions as though the testator died at that time (without children).

5- The points which have not been clearly understood, is that the estate "must descend" — "from him" as "any" intestate estate would do, (first) to his children "AND" (or) (then) to the lawful issue of a deceased child by right of representation, as any intestate estate. How else could he

   1- retain control of his estate
   2- deprive his children of any fee and
   3- vest his estate in his lineal descendants as his intestate property 44 years after his death.

6- Mr. Cassidy created (1) a trust for the lives of his children (2) to terminate it, in effect, cast the remainder of his estate "as intestate property" to his lineal descendants, just the way the will and

statute reads, in over simplified terms which any legislature or jury would by necessity, be required to quickly understand.

In Conclusion

(Intention)

There is *no* evidence to show or imply that Mr. Cassidy ever intended to utilize the so-called second half of the descent statute. "If *no child is living* at the time of his death, etc., etc." Because all of his plans, hopes, thoughts, the rest of the will, every consideration was *for* his children — whom he expected *to be living* at the time of his death. No reasonable man would expect (or be expected) to utilize a sentence which would require *his children* to *predecease* him. It was the last thought in his mind. He would have rewritten his will if the contingency had happened — because this will was for his children, and (AND) then to his lineal descendants, both were his first concern, exactly as the will and statute reads. (87 Me. 132 — *Spear* v. *Fogg*).

Date of Death —

Whereas the (will and the court) require that the condition "*no child is living*" to apply as of June 9, 1961.

And whereas the (descent statute) requires *children* "*to be living*" as of the date of the testator's death, in order for the statute to function and be utilized, *with the will*, the only correct harmonious solution which can satisfy both conditions, would be to admit the "fact" that the will *spoke* as of the "*ACTUAL*" *date* of the testator's death and the (then existing) *statute spoke* as of June 9, 1961, for a man who factually died March 25, 1918, — which he has so grammatically admitted.

Judge Harold Murchie and Judge W. R. Pattengall both contributed, most of the verbage for this last paragraph. Judge Raymond Fellows told us he believes the law court would probably divide the estate into thirds, but he wasn't

sure just exactly how. *Judge Merrill was on and off the fence.

Matthew Laughlin
Counseller at Law
Office, 7 Hammond Street.

Bangor, Me., December 2, 1918.

Edgar A. Simpson, Esq.
Merrill Trust Bldg.,
Bangor, Maine.

In matter of contest over the will of the late Mr. John Cassidy

Brother Simpson:-

I became acquainted with Mr. Cassidy when I first came to Bangor to read law, nearly forty years ago. I may have done some legal business for him, and probably did, but I do not recall anything in particular until September, 1897. I began to do professional business for him then, and continued to do business from that time until the latter part of the year 1909.

The first important business I did for him was in connection with the Penobscot Lumbering Association of which he was President. Charles P. Stetson, Esq. and myself brought suits in favor of the Association in 1897, and from that time until 1909, when I ceased to do business for him, I did a great deal for him. The greater part of it being in connection with corporations in which he was interested, or wild lands in which he was a part owner, complaints for flowage and petitions for partition, etc. etc., and the organization of the corporation, John Cassidy & Son, as I recall.

There was considerable litigation during those years, in which he was interested either individually or as John Cassidy & Son. Judge Stearns and myself were associated

* Enclosed letters

in quite a number of cases tried for him, and Judge Bailey and myself had an important case in behalf of the Eastern Trust & Banking Co. of which he was then President.

He wished to understand all about the cases in which he was in any way connected, either individually or otherwise. He used to come to my office very frequently and when he had any important business, either in court or otherwise, frequently he would come to my office on his way to the Bank about eight o'clock in the morning and consult with me from that time until nine, when he went to the Bank.

I find on my ledger a charge, February 21, 1906, drafting will of John Cassidy. I have no question that that will which I then drafted is the original will which has been filed in Probate Court. I recall in a general way that he took very much pains and a good deal of time in the preparation of that will. He discussed with me every feature of it. I remember distinctly that the will I drafted for him was not executed in my office. He took it from my office, when it was finally completed, with the remark that he would take it over to the Bank and have some of the "boys" act as witnesses. He stated to me some of the reasons why he made the will as he did. He said his intention was to give each of the children sufficient for comfortable support. He thought more than enough for that purpose might be a hindrance rather than a help, making the remark in his peculiar way that the more money a person had the more trouble he had. He also stated that he thought it was fair to all the children to select the oldest and the youngest to act as executors and trustees.

He further stated that perhaps it might be thought he was too liberal to James ("Jim" as he always called him) in allowing him ten thousand dollars a year for taking charge of the estate after his, Mr. John Cassidy's decease,

but he said he did not consider the sum as at all unreasonable, because in his judgment Jim with his ability and experience could go outside and earn more than that sum each year.

As to any codicil or codicils I cannot speak with accuracy. I remember of drafting one codicil, at least, for him and I do not remember of drafting any other.

There is a charge on my ledger, January 18, 1907, drafting codicil to will of John Cassidy. I do not remember whether that codicil was executed in my office. My best impression is that it was, because I have no recollection whatever of his making any statement regarding it, such as he made when he took the will out to have it executed. As to the contents of the codicil, my recollection is good, that the increased to some extent the yearly allowance to his children. I cannot remember as to what extent, and I have a faint impression that he also made some change or some provision in it for his sister, Mrs. Herlihy.

I kept my ledger account usually charges against John Cassidy & Son, and put everything on that. It would be an enormous task to go through my books and pick out all of the legal business I did in which Mr. Cassidy was interested in some way, because the charges might be against a certain town, or against some individual owners of the town, or against some corporation.

I went to the Legislature one or two sessions at his request in connection with the Penobscot Lumbering Association.

No matter what the business was in which he was interested, and no matter how many other people were interested with him in the numerous matters relative to wild lands, division of towns, etc., and petitions for assessment of damages for flowage, etc., and any of the corporation litigation, he was the one that attended to most of it personally, and would discuss every feature of it with me,

and come to the office times and times without number for some purpose in connection with the business in hand. In the dozen years or more in which I did in some way so much professional work for him, from 1897 to 1909, he did not change in the slightest degree. He was just as keen, intelligent and interested the last day as he was the first. One explanation can be given of the unusual and unique method he had of wishing to discuss the legal phases of anything in which he was interested.

He was about the same age as John Varney, a lawyer who began to practice in Bangor about the time that Mr. Cassidy first engaged in business. They were the most intimate friends, socially and otherwise. Mr. Varney was one of the leading attorneys of his day, and during all Mr. Varney's life did business for Mr. Cassidy, continuing up to the time of Mr. Varney's death, and I knew that Mr. Cassidy frequently told me that he used to talk with Mr. Varney constantly about his matters, and Mr. Varney would explain to him what chances he had to win or lose, and in that way it became a habit with him to talk with his counsel on every phase of his business; therefore, he followed the same coarse with me.

Of all the clients I ever had, I think I can safely say that he gave more time to, and was more interested in, his business than anyone I ever knew.

Very truly yours,

M. LAUGHLIN

- - - - - - - - -

On August 6, 1940

Harold Murchie; (later Chief Justice of Maine Supreme Judicial Court)

Said when asked his opinion of the Cassidy will;

"I disagree with your premise, however I agree with your conclusions."

"The will speaks from the date of the death of the testator and is implamented by the Maine Descent-Statute, as of the decease of Mr. Cassidy's last surviving child".

"I have no idea what the law court will say, probably by right of representation."

(Memorandum made by Ralph Dyer, Jr. 8/6/40)

Letter to J. W. Cassidy from Edward F. Merrill

I have given a great deal of careful study to the interpretation of the residuary clause in your father's will providing for the distribution of the residum amont his lineal descendants. My first impression was that, if, at the termination of the trust, the lineal descendants consist of grandchildren or grandchildren and the descendants of grandchildren, the corpus of the estate would be divided into as many shares as your father left children who had issue then living, and that these shares would descend by right of representation to the issue of such deceased children. It is my best opinion however that, when the time for distribution comes, all lineal descendants standing in an equal degree of relationship to your father would take equal shares, and that those of a more remote degree would take the share which their ancestor would have taken.

There are no decisions in this state which I can discover which are exactly in point. There are decisions which would incline one to take either view. On the whole, however, I believe that the manifest purpose of your father's will was to postpone the vesting of the ultimate residue of his estate until after the death of the survivor of his children and that it was then his desire that his lineal descendants of equal degree at that time should share equally, and that the more remote take by representation.

There is no way to get a construction of this by the

court at the present time as the rights of the residuary legatees are clearly made to depend on the law of descent in effect at the time of the distribution. While our present law of descent has been in force for many years and probably will never be changed, I believe that, if the court was asked to construe the will, they would say, "We cannot presume that the law will remain as it is and therefore a decision might be an idle gesture on our part."

It had occurred to me however that, as in your will you do not provide for the distribution to your nephews and nieces until after the decease of the survivor of your brothers and sisters, your will could be so drawn that your desire could be carried out, whichever construction the court might put upon your father's will.

We can both be thinking this phase of the matter over and, when I see you, we can talk it over in detail.

Very truly yours,

MERRILL AND MERRILL

(Signed) By EDWARD F. MERRILL

EFM.W

(See Will of James Cassidy)

See will of James W. Cassidy, dated August 7, 1934;— deceased and probated in Penobscot County, State of Maine, soon after his deceased (March 19, 1938).

This will presumably written with the advise of Edward F. Merrill; states in part:

> "Whereas I cannot be certain whether under said provision of my father's will and codicil above set forth, my niece, Jane Murphy (Sullivan) daughter of my sister, Mary A. Murphy, will receive the same share and proportion thereof than such and each of my nephews and nieces who are the children of my brother, John F. Cassidy, and who may be living at the termination of said trust created by my father

and who may be living at the death of the survivor of my said sisters and brother,"

Another part:—

"if the said Jane Murphy (Sullivan) is to receive a *greater share* of my father's estate than each of the children of my brother John F. Cassidy, who is living at the decease of the survivor of my said sisters and brother, *I wish*, so far as possible in the disposal of my estate to *equalize* the amounts *received from both estates* by my said nephews and nieces who are the children of Mary A. Murphy and John F. Cassidy and who may then be living."

No mention is made of (Edythe Rice Dyer) the only child of his (deceased sister) Rosella Cassidy Rice.

[Letterhead — Pattengall, Goodspeed & Williamson]

June 20, 1938

Ralph A. Dyer, Jr.
199 Exchange Street
Bangor, Maine

Dear Mr. Dyer:

Replying to yours of the 18th, I have *no question* but that on the death of the last of John Cassidy's children, the body of the trust estate will then vest in the grandchildren, the children of each of the original family taking the share *which would have gone to their father or mother*, had no will been made. In other words, if Lucille has no children, the Estate would divide in three equal parts, one part to the children of John, one to the children of Rosella, and one to the children of Mary.

On the second proposition, I have already written Ray that I had a matter which I desired to take up with him, not mentioning what it was but suggesting an appointment. I should hear from him in a day or two. I think there is a fair possibility of recovering the money which should have

been paid to your wife, although the case is not entirely free from doubt.

Concerning your suggestion in regard to fees, there is a provision of law in Maine which makes illegal any arrangement for an attorney to take a case on a stated percentage. It would, therefore, be impossible to definitely agree with your proposition in regard to compensation. The only way to arrange that matter is on the basis that if the Estate paid the bill, the fees would be fixed by the Probate Court; otherwise, if the fees and expenses had to come out of the amount recovered, only reasonable fees would be charged. In any event, I would assume that actual expense properly incurred in connection with the matter would be paid regardless of the result of the litigation.

Yours very truly,

WRP:B

(s) W. R. PATTENGALL

[No. 935]

STATE OF MAINE

Supreme Judicial Court,
sitting as a Law Court.
June Term, 1962.

RE: Petition for Review of Law Court Decision
in
MURRAY v. SULLIVAN, et als

Consideration having been given to the Petition for Review of the Decision of the Law Court, filed by Edythe Rice Dyer, one of the defendants in the case of *Murray v. Sullivan, et als*, opinion filed March 26, 1962, it is

ORDERED that said petition be and it hereby is denied.

June 19, 1962

WALTER M. TAPLEY, JR.
For the Full Court
(excepting Chief Justice Williamson
who did not sit on the case).

LIBRARY
SUPREME COURT, U. S.

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FILED
DEC 3 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

Docket No. 533

EDYTHE L. DYER, *Petitioner*

v.

EDWARD P. MURRAY, as successor trustee under the will of the late JOHN CASSIDY, JANE MURPHY SULLIVAN, ROSELLA MARIE FLYNN, JOAN CASSIDY STETSON, BARBARA ANN CASSIDY and JOHN CASSIDY, *Respondents.*

REPLY BRIEF — to respondents memorandum in opposition.

By: EDYTHE L. DYER,—*pro se*

The respondents with utter disregard decline to answer the issue or the FACTS which cause this case to cry for "good law," with typical lethal innuendo they seek only to score a quick "knock out."

Their reply is inaccurate because:

1—The constitutional issues were raised and are applicable (if for no other reason) than as stated in *Susquehanna Boom Co.* v. *West Branch Boom Co. 3S. Ct. 438, 110 U. S. 57, 28 L. Ed. 69* (hereinafter referred to).

2—The Supreme Judicial Court of *Maine in Laughlin vs. Page, 108 Maine Page 307 at Page 317*, expressed emphatically that the Maine law which has been constant and continuing, should have been the established basis for the decision involved herein.

3—Your petitioner specifically requested the Maine Court, within the appeal period to review the case, and in the plainest pro-se language the constitutional issue was raised. The court's decision was challenged. By necessity and inference the court was compelled by good juris-prudence to consider it, in the petition for review, which accused the court of causing the unconstitutional act.

4—Our attorneys refused to assist in the petition for review, they seemed only interested in quickly obtaining their fees. The attorneys admitted under oath on July 2, 1962, that they "price fixed" among themselves, to obtain legal fees greatly in excess of the final fees allowed by a Superior Court of $197,500.00.

I am not a lawyer and I am not skilled in the intricacies of the law. However I have endeavored not to be-

come involved again, and to review this case on the basis of facts, before this court, because I have no alternative.

It is obvious in my pro se petition (incorporated in the respondents reply brief) to the Supreme Judicial Court of Maine, for review, dated June 5, 1962, and directed to Justice Walter Tapley, Jr., who acted in place of the Chief Justice, (who did not sit, because his son is a member of the respondents law firm) that the whole petition was politely addressed to the Maine Law Court in laymen's verbage with intent to question the court's right to rule as it did, on non-factual assumptions, based upon the court's rewriting a will. If my unprofessional humble effort proved nothing else it challenged the court's questionable authority to disregard facts. By inference, the court had to consider the Constitutional question, both State and Federal.

In my hurried petition for review to the State Court, I did everything I could, I specifically and implicitly raised the issues which obviously deprived me of equal protection of my vested property rights.

The petition shows that this unheard of action by the Maine court, cuts off the true meaning of the Maine Statute and the true meaning of Mr. Cassidy's will.

I was denied the opportunity to further develop or question the court's errors.

Please see Respondents reply brief "Memorandum in Opposition"—for example page (6) (quote):

> "On this point the statute regarding grandchildren is specific."

Also on page (30) thereof quote:

> "The statute fixes its own rules and by these rules we must be governed. *Messer* v. *Jones 88 Me. 353*."

Also see *Cables* vs. *Prescott 67 Maine 583; Doane* v. *Freeman 45 Maine 104 at Page 115*—all of which are confirmed in *Laughlin* vs. *Page, 108 Me. at Page 317.*

There can be no doubt that the constitutional issue was specifically raised! Whereas the petition was denied, the following U. S. cases speak for themselves; (quote):

> "Nothing is better settled than that it is too late to raise a federal question for the first time in a petition for a rehearing, after the final judgment of the state court of last resort, but if, however, the state court actually entertains the petition and decides the federal question, and this appears by the record, the statutory requirement that the right shall be specially set up and denied is complied with." *Susquehanna Boom Co.* v. *West Branch Boom Co. 3S. Ct. 438, 110 UD 28 L. Ed. 69 (see 28 USCA—1257 Page 197, for additional cases).*

The Maine law court assumed that Mr. Cassidy died without children *and* "as though" he died on June 9, 1961, (both assumptions are non-factual). The respondents did not answer these facts.

The decision of the Supreme Judicial Court of Maine in the case, *Matthew Laughlin* vs. *Alonzo Page et als, 108 Me. 317* confirms my contentions and the recognized law of Maine by Justices, Emery, C. J., Spear, Cornish, Kind, Bird and Hadley, J. J., stated in part as follows (quote):

> "Estates tail are estates of inheritance which, *instead of descending to heirs generally,* go to the heirs of heirs of the donees body, which means

> *his lawful issue*, his children, and *through them* to his grandchildren in a direct line, so long as his posterity endures in a regular order and course of descent, and upon the extinction of such issue, the estate determines *(1) Walsh Real Prop. 5th Ed. 72-73.*" (Emphasis added)

The fact that Matthew Laughlin was John Cassidy's attorney (and wrote his will) reflects psychological and significant aspects of the Laughlin vs. Page interpretation.

Whereas a codicil was written to Mr. Cassidy's will on November 11, 1911, it is noteworthy that by coincidence Matthew Laughlin himself was involved as a trustee in this case which the Maine law court interpreted as being the law of Maine on July 18, 1911, approximately (4) months before the Cassidy codicil reconfirmed the original will.

The ruling in Laughlin vs. Page, supra is pertinent to the Cassidy will and no doubt Mr. Cassidy accepted the court's thinking in this case as being the *law* in Maine at that time. The same law has been constant and continuing until the decision in the instant case.

Please note Page No. 16 in the record (quote the Cassidy will):

> "And upon the deecease of each of my said five children, without leaving any lineal descendants living at the time of the death of each of them," etc.—Here the testator identified lineal descendants as being the *issue* of his children.

NOTE—"Issue is synonamous with lineal descendants" *Morse* vs. *Hayden 82 Me. 230.*" Lineal descendants must be the heirs of a deceased person, no one can be the heir of a living person.

PLEASE NOTE—"No rules of civil or the common law, further than as they are adopted by statute can afford them any aid. The statute fixes its own rules and by these rules we must be governed. And the provisions of statute in force at the time of the decease of a person intestate must determine the rights of the heirs to the distribution or descent of his estate as also who are entitled to inherit as heirs of a deceased person. *Messer* vs. *Jones 88 Me. 353.*

The Maine law court has no constitutional right to create two non-factual assumptions, and then utilize both a ~~and~~ statute, as the basis for interpreting a statute, the result of which destroys the vital meaning of a man's will.

Namely 1—to assume that he died in the year 1961 instead of when he actually died March 25, 1918.

2—To assume, (quote the court) "as though"—he died without children—(43) years after his children's actual deaths.

3—and then applied these negative facts to the Maine intestate descent statute as the basis for interpretating the "proportions" of the estate due the heirs.

Respectfully submitted,

EDYTHE L. DYER
Petitioner Pro Se
61 State Street, Bangor, Me.
November 26, 1962

MOTION FILED APR 1 1963

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

Docket No. 533

EDYTHE L. DYER, *Petitioner*

vs.

EDWARD P. MURRAY, as successor trustee under the Will of the late JOHN CASSIDY, JANE MURPHY SULLIVAN, ROSELLA MARIE FLYNN, JOAN CASSIDY STETSON, BARBARA ANN CASSIDY and JOHN CASSIDY, Respondents.

"MOTION for leave to file a petition for rehearing, out of time"

Respectfully submitted,

Edythe L. Dyer,

Petitioner Pro Se.

IN THE

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"MOTION for leave to file a petition for rehearing, out of time"

MOTION

As provided in Rule #58, (The Supreme Court of the United States) I do hereby file this Motion to waive that portion of Rule #58 requiring a petition for rehearing to be made within a (25) day period.

It is my understanding that your Court has the power to waive its own rules. As support for this request, may I point out that:

1. I have been conducting my own case on a pro se basis.
2. Whereas my petition for certiorari to the Supreme Court of the United States was denied on January 7, 1963, and that the attached decision by the Supreme Judicial Court of Maine (Docket #50 Stetson vs Johnson) was *NOT* filed until February 5, 1963 this material fact was not previously available to me. This decision is inconsistent with this court's prior decision (179A 2nd 307 Murray vs Sullivan) on which my writ was considered. The inconsistency of the two decisions are ambivalent and non-factual, thus proving my original contention in my petition for certiorari (docket #533—Oct. term 1962 Dyer vs Murray Supreme Court of United States) to be correct and now so admitted by the same Maine Court.
3. That I have recently communicated with your Court re: letters to E. C. Schade, Deputy Clerk, dated Feb. 7th and 9th, 1963 as soon as possible upon receipt of the Maine Court's recent ruling.
4. And that, being unfamiliar with the mechanics of your Court and the time factors which were beyond my control, I do hereby request permission for a rehearing.

I do hereby swear and certify that this petition for rehearing is not taken for delay and is presented in good faith.

On March 6, 1963 I petitioned the Supreme Judicial Court of Maine, within the appeal period allowed for (Docket #50

Cassidy vs Johnson, Feb. 5, 1963) —it was denied on March 8, 1963.

The petition for review was on the basis of both State and Federal constitutional law.

> "Finding of fact contrary to the weight of evidence is an error of fact" (224 F. 60-62)

In the Maine Court's most recent ruling (Docket #50) the court stated and ruled for inheritance tax reasons, that Mr. Cassidy died on March 25, 1918.

In the Maine case—(179A 2nd 307, Murray vs Sullivan, March 23, 1962) The Supreme Judicial Court of Maine ruled in part, (quote),

> "As already noted the sentence reads—IF no child is living at the time of his death, to all of his lineal descendants equally, if all are of the same degree of kindred, if not according to the right of representation."

Here the Maine Court adopted this (IF) condition in the Maine intestate descent statute and gave the testator an *artificial death date*, so that this part of the statute would agree with the Court's construction.

The Court ASSUMED that Mr. Cassidy died intestate on June 9, 1961, approximately (44) years after his *actual* death date, March 25, 1918.

(Again Quote the Court)

> "To effectuate the testator's intention as disclosed by his testamentary pattern the *statute must* be applied *AS THROUGH* the testator's death occurred immediately after the death of his last surviving child, so that the condition that 'no child is living' is satisfied." (Emphasis added)

This assumption was unnecessary for the court only needed to recognize the true natural date of death, required by the statute, and the whole pattern of the will and statute fitted together perfectly.

All through the Descent Statute, in the Revised Statutes of Maine, the law refers only to a man's actual death date. There is no provision for TWO legal, statutory death dates.

One of these "*legal*" statutory death dates must be non-factual, thus proving discrepancy, for practical reasons, if for no other.

By using or assuming two death dates, the Maine court has in essence affected the "proportional" distribution of this estate, which deprives me of property, causing a (1/6) distribution to me instead of (1/3) of a multi million dollar estate. To Wit:

It is the contention of this petitioner that although each state has reserved its power to control the inheritance of property, each must exercise its laws uniformly. The Supreme Judicial Court of Maine has violated the 14th Amendment by failing to so regulate the distribution of the Estate of John Cassidy due to their failure to follow the statute of intestacy as directed by the terms of the will, and as compelled and directed to do under the 14th Amendment to the Constitution of the United States.

This same court has now ruled "as though" a man, intestate died at two different dates, namely: June 9, 1961, when his trust estate terminated as an intestate estate; and on March 25, 1918 (when he actually died) for inheritance tax purposes.

Your petitioner maintains that it is improper for the Maine Court to assume an artificial death date, to distribute an estate on the basis of the State INTESTATE statute when in fact, the statute; manifestly requires the mechanics of the statute to function only upon known FACTS.

1. That he did have children living, and the issue of a deceased child, at the time of his death, March 25, 1918. This FACT must be the first consideration in order for the descent statute to function at any time; according to the Revised Statutes of Maine.

2. THE DESCENT STATUTE: The Revised Statutes of Maine, Volume 4, Chap. 170 (II) specifically states (quote). "The remainder of which he (Mr. Cassidy) *dies seized*, descends in equal shares to his children AND to the lawful issue of a deceased child by right of representation. *IF* no child is living *at the time of his death*, to all of his lineal descendants equally if all are of the same degree of kindred, if not according to the right of *representation.*

PLEASE NOTE—(IF) is a condition predicated only upon (the time of his death)

Here is the "Conditional part" of the statute which the Maine court adopted and consequently re-wrote Mr. Cassidy's will. The whole premise is based upon a non-factual condition and an artificial assumption.

Nothing can be clearer, the words are certain and they say exactly what the Maine Legislature intended for them to mean.

"IF" no child is living *at the time of his death!* The Court has *assumed* that he did not die when he did die, and that he did die without children, (only grandchildren). Then the court utilized the "IF" condition in the statute as of 1961 instead of 1918.

However he did die with children and the issue of a pre-deceased child.

How incongruous, how unconstitutional can a court apply construction, in order to utilize the Statute *requested* in the will?

If the statute is used (except as a regular intestate estate) surely it is the duty of the Maine court to apply the FACTS; for there is no other law, unless it can be tailor made by the court, without the legislature.

The most striking FACT is that if the court recognized the FACT that the man died in 1918, all else would have been crystal clear (without ASSUMPTION or construction)!

PLEASE NOTE the statute states: that *of which a man dies seized* (descends) to his children AND to the lawful issue of a predeceased child.

3. These conditions are the LAWS OF MAINE, made and approved by the Maine Legislature, a branch of the Maine government, which cannot constiutionally be broken.

4. The Supreme Judicial Court of Maine has *NOW* just ruled (Docket #50, Stetson vs. Johnson, Feb. 5, 1963) (Quote the Court) "It is clear that the only value to be considered for assessment purposes under the provisions of the law as it "THEN" stood was the value at the date of the testator's death." (1918).

THEN was a key word in the original case (179A 2nd 307:—Murray vs Sullivan) It is a coincidence that a different meaning as to when THEN actually is, is now used by the same court.

In fact, this latest ruling is exactly why the intestate statute must be synonymous with the use of the inheritance tax statute, namely, as of the date the man actually died, and is so admitted by the court.

To use the INTESTATE statute at any other date (except the true date of death) would be irregular, void, and would render it impossible to use (for lack of clarity) because it was not designed to be used at any other time. Any twisting or altering of the statute's meaning on the basis of an assumed death date, changes the conditions and the terms of the statute to such an extent as to make it irreconcilable, irregular and unconstitutional, both State and Federal, thus voiding any application of the implied meaning which the Maine Court has tried to read into this will. (However the will and statute speak for themselves).

The (court's construction) is so ambivalent, so latent, so obvious and so impossible to reconcile that your petitioner charges the Supreme Judicial Court of Maine did give mean-

ing to the statute which is contra to the constitution of the United States.

My only conclusion is that the Supreme Judicial Court of Maine was in error, when it ruled that the estate passed (quote) "as though" Mr. Cassidy died on June 9, 1961 (which he did not do). The court should have ruled that the estate passed (*as the statute provided* on June 9th, 1961)—"as though" Mr. Cassidy *died on March 25, 1918* (which he did do) and as the court was quick to admit in its recent decision. Please also see this Maine Court's ruling in 108 Me. at page 317) Matthew Laughlin vs. Alonzo Page. Stated in part as follows (quote):

> "Estates tail are estates of inheritance which, instead of descending to heirs generally, go to the heirs of heirs of the donees body, which means *his* lawful issue, his children, and *through them* to his grandchildren in a direct line, so long as his posterity endures in a regular order and course of descent, and upon the extinction of such issue, the estate determines. (1) Walsh Real prop. 5th Ed. 72-73." (Emphasis added)

Mr. Cassidy's will requested, in part,

> "Upon the termination of this trust, as aforesaid, namely after the decease of all of my said five named children, all *my* estate in whatever form the estate shall then be, shall then vest in and become the property of all of *my lineal descendants*, if any, then living, *in the same manner* and the *same proportions* as shall then be provided by the then existing laws of the State of Maine for *descent* among lineal descendants of *Intestate* property real and personal." (Laws in 1961 were same as in 1918)—(Emphasis added)

PLEASE NOTE: This case *is* exactly to the point! (Quote the same Maine court)

> "The question then is, whether these heirs shall take per capita or per stirpes, and the court are of opinion, that

according to the established rule of law a devise to "heirs" whether it be to *ones own heirs, or to the heirs of a third person*, designates not only the persons who are to take but also the *manner and proportions in which they are to take;* and that, when there are no words to control the presumption of the will of the testator, the law presumes his intention to be, that they shall take as heirs would take by the *rules of descent*. Therefore in the present case, where there are no such words, the true construction of the will is, that the grandchildren take per stirpes and not per capita." (Doherty vs Grady 105 Me. 36 at page 44)—(Emphasis added)

PLEASE NOTE: Here the Supreme Judicial Court of Maine on December 24, 1908, just prior to the Cassidy will, wrote this law which Mr. Cassidy's attorney surely must have been aware of. (NOTE) Whether it be to ones own heirs or the heirs of a third person—(this is most conclusive!)

PLEASE NQTE ALSO THAT; Whereas Mr. Cassidy's will specifically requested for his estate to *Descend;* in the same *Manner and Proportion* as provided by the *laws of the State of Maine;* there can be *no doubt* what he meant. (His legal heirs whoever they were) and if none then to (his sisters legal heirs whoever they might be).

The Maine Supreme Court rewrote this man's will by assuming—and assumption is not fact! The intestate statute can only use the true date of death, when it was intended to be used by the Maine legislature (if it is constitutionally used at all at a later date) (June 9, 1961 instead of March 25, 1918), as a part of this will. (Same as an ordinary statutory Intestate estate).

There is written proof, inherent in the will, that Mr. Cassidy wanted:

(1) *His* property

(2) to *descend*

(3) to his *lineal* descendants

(4) in the *same manner* and proportions as provided by the *LAWS* of the State of Maine on *June 9, 1961.*

(5) Same as *INTESTATE* property (for any man)

(6) In the same way Mr. Cassidy and his lawyer Matthew Laughlin—understood the law to be, as the Maine Court ruled, in Matthew Laughlin vs Alonzo Page, 108 Me. at page 317) (Supra)

The *Laughlin case* proves that the only Maine law that attorney Laughlin and Mr. Cassidy (his client) knew or could expect—IS IN FACT THAT:—the estate could only pass to his heirs, (whoever) after all of his children were deceased (June 9, 1961)—same as any intestate estate.

WHEREAS Mr. Cassidy did actually die on March 25, 1918, the only "legal" death date which the intestate statute could and *must* use for any intestate estate, as provided by the *laws* of the State of Maine, *must* be by statute his true date of death, March 25, 1918.

The penetrating fact is that only a per stirpes ruling is constitutional; to do otherwise deprives me of my rights under the 14th Amendment to the Constitution of the United States.

PLEASE NOTE: When a testator directs in plain and simple language that he wants his estate to *DESCEND* (in the same manner and proportions, as provided by the laws of the State of Maine for *descent* among *lineal* descendants of INTESTATE property) he is talking about his *heirs.* The common law rule of property rather than construction provides without equivocation that a man cannot make *his* own *HEIRS* his purchasers. (60F 21-29) (69 NH 372)—(this was one of the Federal cases in my first petition to the Maine Court June 5, 1962, page 15.

DESCENDANTS are, "All persons who have descended

from a common ancestor". (Black's Dictionary 3rd Ed. page 1013) (many cases)

The testator requested Estate to Descend The Revised Statutes of Maine (1954) Vol. (4) Page 665—Chap. 170, Sec. VIII; (quote) *The rights of descent flow from the legal status of the parties* and where the status is fixed, the law supplies the rules of descent, with reference to the situation as it existed *at the death of the decendent*. Getchell vs Curtis 134 Me. 302; 186A 669 (Emphasis added)

PLEASE NOTE: The Revised Statutes of Maine (1954) Vol. (4) Chap. 170, Page 666, Sec. (2) (quote) *How degrees of kindred computed*

> In the mode of computing the degrees of consanguinity, the civil law, which is generally followed in this country upon that point, begins with the *intestate* and ascends from him to a *common ancestor* and descends from that ancestor to the next heir, reckoning a degree for each person as well in the *ascending* as *descending lines*. Cables vs Prescott 67 Me. 582 (Emphasis added)

PLEASE NOTE: The statute fixes its own rules, and by these rules we must be governed (Messer v Jones 88 Me. 353)—(67 Me. 583) (45 Me. 115)

PLEASE NOTE: If two constructions may be put upon a provision in a will, one of which will violate an inflexible rule of law and the other not, the construction which will not offend the rule is to be adopted by the court.. (Towle vs Doe 97 Me. 433)

PLEASE NOTE: Your petitioner, was the issue of a predeceased child.

Property acquired by (DESCENT) is property which the law, *upon the death of the ancestor*, casts on the heir. (Orr v White 6 NW 99) (title by descent—Black's Dic. 3rd Ed.).

PLEASE NOTE The only fatal ambiguity has been created *unnecessarily* by the Maine Court when it *assumed*

"as though" the testator died on June 9, 1961. This construction was not obligatory, a natural clear interpretation was at hand for the court to adopt, based upon *Fact*—and proof of death.

It is common knowledge and accepted Maine law that a man is not intestate until he is dead and then and *only* then can his estate be probated and distributed (according to Maine law). By *changing* the natural death date the Maine court created a different legislative meaning for the descent statute and different proportions for the heirs. (In effect the Judicial branch of government has written a new law) (and that the present statute does not mean what it says).

Namely: (a) for the court to assume the testator died on June 9, 1961—and to THEN apply the statute (quote court) "as though"—he *THEN DIED*—created a per capita distribution among his *final* descendants living on June 9, 1961.

(b) However, the court should have assumed (correctly) that the testator died on March 25, 1918, and wished to distribute the estate among his heirs living on June 9, 1961—as provided by the intestate laws of Maine. (Without conflict between the will and statute) (without the court creating an artificial death date)—(without the court unnecessarily rewriting the will).

The Court needed only to adopt the true date of death (March 25, 1918) and all the "jig saw" pieces fitted together perfectly and in harmony with all the other phases of the will and statute. A per stirpes distribution could be the only result. No construction was necessary to establish intent, the will pattern was clearly to be by *right of representation* all through the will.

WHAT IS THE PRINCIPAL OF THE FEDERAL QUESTION HERE?

Thinking people must "stand" for and seek the most infetessimal fundamental truths, or we "fall" for hasty ASSUMPTION. That which (is), that which is apparent and understood to exist, a known fundamental fact, must be recognized, or life and "justice" is only intrigue and a sham.

Can the Supreme Judicial Court of Maine, *not* be wrong? Can it be permitted, under the 14th Amendment to ASSUME that this man intended to apply the Maine intestate statute "AS THOUGH" he died on June 9th, 1961 (which he did not do, and obviously did not intend to do)? If so then any tyranny under law is possible.

Only the Supreme Court of the United States has the authority, under the 14th Amendment to see through this legal maze of parlance and procedure to allow the light of legal truth to prevail as the national vogue and our way of life demands.

The inherent principal; and my plea for social justice is not only equitably right, it should be the desired constitutional duty of the Supreme Court of the United States to want State courts to play the game according to their own laws. For herein lies the germ of hypocrasy and sophistication, which destroys the strongest individuals faith and moral fiber; the essence of democracy must be preserved.

Believing that opportunity comes only to those who know what to do with it, I respectfully request your court to review the decision (Docket #50 Stetson vs. Johnson) in conjunction with (179A—2nd 307 Murray vs. Sullivan) and allow me to

reopen this matter before your court, with competent counsel, on the basis of FACT and equal justice under law.

Respectfully submitted,

EDYTHE L. DYER,

c/o 61 State Street

Bangor, Maine

March 23, 1963

(Emphasis added)